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Supreme Court, U.S.
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Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,
Petitioner,

v.

BRADLEY NIGH,
Respondent.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act (TILA) recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A) – though there is no evidence of any Congressional intent to effect such a change – so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Bradley Nigh, Koons Buick Pontiac GMC, Inc., and Household Automotive Finance Corporation. Petitioner Koons Buick Pontiac GMC, Inc., states, pursuant to Supreme Court Rule 29.6, that it has no parent companies, subsidiaries, or affiliates.

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PETITION FOR A WRIT OF CERTIORARI

Koons Buick Pontiac GMC, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-22a) was issued on February 4, 2003 and is reported at 319 F.3d 119 (4th Cir. 2003). The order of the court of appeals denying Petitioner's petition for rehearing and rehearing *en banc* (Pet. App. 55a-56a) was issued on July 9, 2003 and is unreported.

The judgment of the United States District Court for the Eastern District of Virginia, Alexandria Division (Pet. App. 23a-40a), was issued on August 15, 2001 and is unreported. The order of the district court concerning attorneys' fees awarded to Respondent (Pet. App. 41a-54a) was issued on August 10, 2001 and is unreported.

JURISDICTIONAL STATEMENT

The order of the United States Court of Appeals for the Fourth Circuit denying Petitioner's petition for rehearing and rehearing *en banc* was issued on July 9, 2003. (Pet. App. 55a-56a) This Court has jurisdiction under 28 U.S.C. § 1254(1) (2003).

STATUTE INVOLVED

Section 1640(a) of the Truth in Lending Act (TILA) provides, in pertinent part, that:

> (a) [A]ny creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of –
>
> > (1) any actual damage sustained by such person as a result of the failure;

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2000.

15 U.S.C. § 1640(a) (2003).

STATEMENT

A. Statutory Background

Congress enacted TILA in 1968, Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601-1666 (2003)), to address concerns about both a lack of uniformity in lender disclosures to consumers and deceptive credit practices, S. REP. NO. 90-392, at 2 (1967). Congress therefore sought to protect consumers by "assur[ing] a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." Consumer Credit Protection Act § 102.

Thus TILA is primarily a disclosure statute which imposes requirements in connection with a very broad range of consumer credit transactions.[1] The most important of these

[1] TILA established requirements for two categories of credit: (1) closed-end credit, including individual transactions involving direct loans and installment credit sales, where credit extended in connection with a single transaction is usually payable over a fixed term (e.g., automobile financing, home equity loans, bank signature loans, small loans, and home mortgages); and (2) open-end credit, which generally includes "plans" which contemplate repeated transactions and impose finance charges from time to time on an unpaid balance (e.g., credit card plans, charge accounts, home equity lines of credit, and revolving credit plans). Consumer Credit Protection Act § 103(i) (codified as amended at 15 U.S.C. § 1602(i)) (definition of "open-end" credit); *see also* RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING §§ 1.01[1], 5.01[1] (2000).

provisions mandate disclosure of the "finance charge" (the total cost to the consumer of credit) and the annualized simple interest rate of that finance charge (the "annual percentage rate"). 15 U.S.C. §§ 1605-1606.[2] The Act governs both lending documents created at the initiation of a transaction and subsequent documents, such as periodic statements. 15 U.S.C. §§ 1637-1639. In addition to its disclosure mandates, TILA's implementing regulations also impose procedural requirements, such as prescribed processes for resolving billing errors in open-end credit plans. *See* Regulation Z, 12 C.F.R. § 226.13 (2003).[3]

TILA provides a three-pronged enforcement mechanism: administrative agency enforcement, criminal penalties, and private civil liability. 15 U.S.C. §§ 1607, 1611, 1640. Since TILA's enactment, though, agency enforcement and assessment of criminal penalties have been relatively rare, while private civil actions have emerged as the dominant source of enforcement. *See* RALPH J. ROHNER & FRED H. MILLER, TRUTH IN LENDING § 13.01 (2000) (emergence of civil enforcement); *see also Edwards v. Your Credit, Inc.*, 148

[2] Other required disclosures include time periods in which balances may be repaid without incurring finance charges, conditions under which charges are imposed, the methods of determining charges, various dates (e.g., payment due dates), additional charges, total amounts financed, potential delinquency charges, and descriptions of any creditor security interests related to the transaction. 15 U.S.C. §§ 1637-1639.

[3] TILA directed the Federal Reserve Board to promulgate regulations, now known as Regulation Z, to accomplish the Act's purposes. *See* Regulation Z, 12 C.F.R. § 226. Regulation Z is the primary source to which lenders turn for compliance guidance.

F.3d 427, 432 (5th Cir. 1998). Although criminal liability under TILA may attach only for certain willful and knowing violations, *see* 15 U.S.C. § 1611, TILA establishes a remedial scheme of virtually strict liability in the civil context. 15 U.S.C. § 1640.

Outside TILA's minimal statutory margins for error,[4] creditors violating the Act's disclosure requirements may avoid liability under Section 1640 only by correcting errors within 60 days of discovery (and notifying the obligor of the correction), 15 U.S.C. § 1640(b), or by "show[ing] by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." 15 U.S.C. § 1640(c). Creditors failing to comply with the Act's substantive requirements, such as mandated billing error resolution processes in open-end credit plans, will likewise be subject to strict liability under TILA's provision for civil actions. 15 U.S.C. § 1640 (imposing liability for violations of "any requirement" of the Act, including provisions related to credit transactions (Part B), credit billing (Part D), and consumer leases (Part E)).

As initially enacted in 1968, the statutory damages provision, which allows recovery without proof of any injury, contained only the measure of recovery now at issue, with a $100 minimum and a $1,000 maximum – "twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1000. . . ." Consumer Credit Protection Act § 130(a); *see* H. R. REP. NO. 90-1040 (1967), *reprinted in* 1968 U.S.C.C.A.N. 1962, 1976 (explaining scheme based on double the finance charge with $100

[4] *See* 15 U.S.C. § 1605(f)(1)(A) ($100 margin for error in loans secured by real estate); 12 C.F.R. § 226.14(a) (providing margin for error in APR calculations of 1/8 of 1 percent); 12 C.F.R. § 226.18(d)(2) ($5 variance for transactions with $1,000 or less financed and $10 variance for transactions with $1,000 or more financed).

minimum and $1,000 maximum). In 1974, the statute was amended to allow for recovery of actual damages in addition to the statutory damages already available. *See* Truth in Lending Act Amendments of 1974, Pub. L. No. 93-495, § 408, 88 Stat. 1500, 1518 (1974); 15 U.S.C. § 1640(a)(1).

In 1976, Congress passed the Consumer Leasing Act, which applied truth-in-lending protections to consumer leases. Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (1976). Leases had been increasing in popularity, particularly in the automotive industry, and because they typically did not impose "finance charges" on consumers, they had not previously been covered by TILA. S. REP. NO. 94-590, at 2 (1976). As part of the Act, Congress amended the statutory damages provision at issue here, inserting a second clause (ii) between the provision for "twice the amount of the finance charge" and the $100-$1,000 damages limitation. Consumer Leasing Act of 1976 § 4.[5]

Nothing in the language or history of this 1976 amendment suggested any purpose of rendering the $100-$1,000 limitation inapplicable to the original "twice the amount of the finance charge" measure of liability. To the contrary, the Senate Report simply explained that the Act was creating for consumer leases a civil penalty "equivalent in dollar amount to that imposed on other creditors." S. REP. NO. 94-590, at 8.

[5] The provision thus imposed liability

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000. . . .

15 U.S.C. § 1640(a)(2)(A) (1976).

Accordingly, following the 1976 amendment, cases predicating liability on subpart (i) consistently found the $100-$1,000 limitation still to apply. *See Purtle v. Eldridge Auto Sales, Inc.*, 91 F.3d 797, 800 (6th Cir. 1996) (stating that "[i]n the event that a creditor fails to [comply with TILA], a consumer may bring a civil action against the creditor [and] may recover twice the amount of the finance charge (but not less than $100 nor more than $1,000)"); *Cowen v. Bank United of Texas*, 70 F.3d 937, 941 (7th Cir. 1995) (noting that statute allows "the recovery of twice the finance charge up to $1,000"); *Mars v. Spartanburg Chrysler Plymouth, Inc.*, 713 F.2d 65, 67 (4th Cir. 1983) (stating that statute allows twice the finance charge, capped at $1,000); *Dryden v. Lou Budke's Arrow Fin. Co.*, 661 F.2d 1186, 1191 n.7 (8th Cir. 1981) (noting that statutory damages are "in the amount of twice the finance charge, with liability of not less than $100 and not more than $1,000").

In 1995, the statute was amended yet again, this time by the addition to Section 1640(a)(2)(A) of a new subsection (iii), which contained a damages clause covering a second subcategory of credit transactions: closed-end loans secured by real estate (e.g., mortgages, refinancings and home equity loans). Truth in Lending Act Amendments of 1995, Pub. L. No. 104-29, § 6, 109 Stat. 271, 274 (1995). This change did not create a new form of liability; these transactions had been covered under the previous statute. It simply increased the potential liability for such loans to "not less than $200 or greater than $2000."

Other than that addition, the movement of the word "or" to immediately precede "(iii)," and the updating of a statutory reference included in subsection (ii), Congress did not change a single word of the pre-existing clauses.[6] Nor is there any

[6] The revised statute imposes liability "in an amount equal to the sum of":

> (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2000.

15 U.S.C. § 1640(a)(2)(A).

hint in the statutory language or in the legislative history of any purpose or policy of removing the longstanding $100-$1,000 limitation from the liability provision based on twice the amount of the finance charge. Congress's sole apparent purpose in adding the new subpart (iii) was to subject closed-end loans secured by real estate to slightly greater liability (a $2,000 cap in place of the previous $1,000 cap). *See* H. R. REP. NO. 104-193, at 99 (1995); 141 Cong. Rec. S14566, S14568 (daily ed. Sept. 28, 1995) (statement of Sen. Mack); 141 Cong. Rec. H9513, H9516 (daily ed. Sept. 27, 1995) (statement of Rep. McCollum). There was never any suggestion that Congress contemplated at the same time removing the existing $1,000 cap for other types of consumer transactions under subpart (i).

B. Proceedings Below

In February 2000, Respondent Nigh sought to purchase a used 1997 Chevrolet Blazer from Petitioner Koons Buick Pontiac GMC, Inc., and to trade in his prior vehicle. This transaction went through several permutations and was subject to various disagreements and misunderstandings between the parties.

Initially, to receive consumer financing, Respondent executed a Buyer's Order, reflecting the proposed purchase, and a Retail Installment Sales Contract (RISC), reflecting the proposed financing. Both documents indicated that Respondent would pay $4,000 down and trade in his prior vehicle. Respondent estimated the trade-in vehicle's

remaining loan balance and agreed to pay off any excess balance above this amount. Once Respondent paid the $4,000 down payment and tendered his trade-in vehicle, Petitioner began seeking a lender to buy an assignment of the installment payments owed by Respondent under the RISC.

In order to satisfy a prospective lender, Household Automotive Finance Corporation (HAFC), Petitioner restructured the deal to require an additional $2,000 down payment from Respondent, necessitating a new RISC. After some protest, Respondent signed the second RISC, along with a $2,000 promissory note for the increased down payment. However, when Petitioner was informed by HAFC that an additional charge for a Silencer car alarm had been mistakenly included in these new documents, it prepared a third RISC deleting reference to and charges for the Silencer.

Respondent returned to the dealership and signed the third RISC. Petitioner was then able to close the transaction by executing the contract documents and selling an assignment of Respondent's installment payments to HAFC.

Contrary to his agreement, Respondent failed, after a number of requests, to pay the excess amount over the estimated loan balance owed on his trade-in vehicle – nearly $2,000. Accordingly, HAFC repossessed that vehicle from Petitioner's lot. Thereafter, Respondent, who alleged that he had previously believed the trade-in vehicle no longer belonged to him, indicated that he would honor his contractual commitments, and Petitioner paid both the lien and the repossession charges owed on the trade-in vehicle in order to have it released by HAFC. However, Respondent never made the promised payments.

After driving the Blazer for a number of weeks, Respondent returned it to the dealership asserting a right of rescission because of the issues involving his trade-in vehicle. Respondent had not made a single payment on the Blazer other than the initial $4,000 down payment amount; nor had he attempted to pay the $2,000 promissory note.

On October 3, 2000, Respondent filed suit in the United States District Court for the Eastern District of Virginia, advancing claims under the Truth in Lending Act (TILA), the Federal Odometer Act (FOA), and the Virginia Consumer Protection Act (VCPA), along with claims sounding in contract, fraud, and conversion. In turn, Petitioner filed counterclaims for breach of contract and fraudulent and negligent misrepresentation.

On April 20, 2001, the district court granted summary judgment to Petitioner on most of its counterclaims and entered judgment for Petitioner on all but three of Respondent's claims. Only Respondent's FOA, VCPA, and TILA claims remained for trial, which was held on May 2, 2001.

After a conference with counsel during trial on the "issue of the maximum recovery" under TILA, the district court rejected Petitioner's argument that any TILA award to Respondent should be limited to $1,000, recognizing that its ruling conflicted with a holding by the Seventh Circuit on the same issue. *See* Joint App. ("JA")[7] at 647, 655. The court therefore instructed the jury that if it found Petitioner to have violated TILA, Respondent was "entitle[d] . . . to receive statutory damages of twice the amount of any finance charge in connection with the transaction." *Id.* at 670. In response to these instructions, the jury submitted a question to the court, asking whether it was required to give Respondent twice the finance charges if it found Petitioner had violated TILA, or whether it "ha[d] the discretion to give a different amount." *Id.* at 749. The court informed the jury that it did "not have the discretion to award a lesser amount" if it found for Respondent on the TILA claim. *Id.* at 753.

On May 3, 2001, the jury returned a verdict in Petitioner's favor on the FOA claim and in Respondent's favor on the

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[7] "JA" refers to the Joint Appendix filed by the parties in the Fourth Circuit.

TILA and VCPA claims. On the TILA claim, the jury awarded Respondent $24,192.80, twice the amount of the finance charges in connection with the second RISC. *Id.* at 756-57. On the VCPA claim, the jury awarded Respondent $4,000, the amount of the down payment he originally tendered to Petitioner.

On August 10, 2001, the district court awarded Respondent attorneys' fees and court costs in the amount of $26,129.10. (Pet. App. 53a) On August 15, 2001, the court entered final judgment, awarding Respondent $24,192.80 for violation of TILA, 15 U.S.C. § 1640(a)(2)(A)(i), and $4,000 for violation of the VCPA, Va. Code Ann. § 59.1-200, plus interest. (Pet. App. 37a-39a) In addition, the court awarded Petitioner $2,000 for Respondent's failure to pay on his promissory note and $1,959.73 for Respondent's breach of his agreement to pay the excess over his trade-in vehicle's loan balance. (Pet. App. 39a)

On February 4, 2003, a panel of the Fourth Circuit affirmed the judgment of the district court. (Pet. App. 1a-22a) Although other issues were before the Fourth Circuit, the only issue relevant to this petition is the calculation of statutory damages for the jury's finding that Petitioner violated TILA, on which the Fourth Circuit panel divided two-to-one.

The majority, focusing solely on the language of the current, amended TILA damages provision, affirmed the award of statutory damages of twice the finance charge in connection with the transaction, determining that the $1,000 damages cap described in Section 1640(a)(2)(A) applied only to subpart (ii), which it immediately follows. (Pet. App. 11a)[8] The Court determined that whereas before the 1995 amendment to TILA's statutory damages provision "it was

[8] The majority found TILA liability arose from Respondent's signing of the second RISC and his giving over the signed documents to Petitioner, even though this finance agreement was not ultimately funded and Respondent thus suffered no injury under this agreement. (Pet. App. 7a)

plausible to interpret the maximum and minimum provision as coming at the end of subparagraph (A), and not exclusively within subparagraph (ii), the new provision clearly places that clause wholly within (ii)." (Pet. App. 11a) The majority reasoned that the different statutory maximum and minimum in subpart (iii) "shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii)." (Pet. App. 11a) Discounting the statutory provision's prior history, the majority limited the question before it "simply [to] whether Congress amended the statute in a way relevant to the prior interpretation, and if it did, what does the amended statute mean." (Pet. App. 12a) The court conceded that "[i]t could well be . . . that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995." (Pet. App. 13a) Nonetheless, the court determined that "the critical point of law – and it is critical – is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent." (Pet. App. 13a) Based upon that amended statute, the majority concluded that "Congress did alter the statutory cap regardless of its intent" and that "[i]t is the statute, not any inferential intent, that constitutes the law." (Pet. App. 13a)

In his dissent, Judge Gregory opined that application of the $1,000 damages cap, which had been applied universally to TILA violations under subpart (i) of the previous manifestation of the statutory provision, did not change with the amendment to the provision, and that Respondent's TILA award under Section 1640(a)(2)(A)(i) should therefore have been capped at $1,000. (Pet. App. 17a) Judge Gregory also reasoned that "[i]f the $1,000 cap was intended to apply only to (ii) . . . then the inclusion of the phrase 'under this subparagraph' in subpart (ii) would be superfluous; the meaning of (ii) would be unchanged by its deletion." (Pet. App. 21a) Further, Judge Gregory pointed out, the majority's interpretation of the phrase "under this subparagraph" is

inconsistent with the use of the same phrase in Section 1640(a)(2)(B) (concerning class actions), where the words indisputably apply to all of subparagraph (B). He also noted that the effect of the majority's view is "to dramatically increase creditors' exposure to liability under Section 1640(a)(2)(A), without any explicit, statutory language to support such an increase." (Pet. App. 22a)

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S HOLDING THAT TILA'S $1,000 DAMAGES CAP DOES NOT APPLY TO CLAIMS UNDER SECTION 1640(a)(2)(A)(i) CREATES A CLEAR CONFLICT IN THE CIRCUITS

This case involves a sharp and financially important departure – and a split in the circuits – in the interpretation of TILA's most commonly applied liability provision, Section 1640(a)(2)(A)(i). Prior to the decision below, since the original enactment of TILA in 1968, all federal courts of appeals have consistently recognized that recoveries of statutory damages in a credit transaction – absent proof of actual damages – are limited by the statute's $100-$1,000 floor and ceiling. When the Fourth Circuit affirmed the district court's award of $24,192.80 plus $26,129.10 for attorneys' fees and costs[9] (plus interest) based on Petitioner's TILA violation on the ground that the $1,000 cap is no longer applicable to subpart (i), it created a circuit split that will likely be a fount of much wasteful and speculative litigation.

[9] Although attorneys' fees are recoverable under both TILA, 15 U.S.C. § 1640(a)(3), and VCPA, Va. Code Ann. § 59.1-204, it is reasonable to believe that the total amount of any attorneys' fee award would be impacted by a decision by this Court to reduce Respondent's TILA award from $24,192.80 to $1,000. Petitioner, therefore, seeks reversal of the TILA damage award and remand for reconsideration of the fee award.

As the dissenting opinion in the Fourth Circuit points out, the majority's conclusion is in clear conflict with the United States Court of Appeals for the Seventh Circuit in *Strange v. Monogram Credit Card Bank of Ga.*, 129 F.3d 943, 947 (7th Cir. 1997). The Seventh Circuit in *Strange* concluded, as did Judge Gregory, that Congress had not intended to affect application of the $1,000 damages cap previously established for TILA violations under Sections 1640(a)(2)(A)(i) and (ii) when, in 1995, it amended 15 U.S.C. § 1640(a)(2)(A) to add a new subsection (iii) setting a $200 minimum and a $2,000 maximum on statutory damages arising from closed-end real estate credit transactions.

The Seventh Circuit noted that, although the reading that the $100-$1,000 limit in subpart (ii) applies only to that subpart "has a certain appeal given the fact that subsection (ii) is the only one of the three subparts to mention the $100/$1,000 amounts, the history of this part of the statute suggests that such a reading has its own problems." *Id.* The *Strange* court recounted the provision's statutory history, pointing out that courts had uniformly interpreted the $100 minimum and $1,000 maximum as applying to both subparts (i) and (ii) until "the 1995 addition of sub-subsection (A)(iii) that introduced the ambiguity with which we are now confronted." *Id.* The Seventh Circuit explained that "the 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A)." *Id.* It therefore concluded that "the 'subparagraph' mentioned in § 1640(a)(2)(A)(ii) continues to encompass what is now codified as subparts (A)(i) and (A)(ii), not just subpart (A)(ii)." *Id.*

The split between the Fourth and Seventh Circuits concerning the meaning and application of Section 1640(a)(2)(A) is a crisp and clear one which will not be aided by further percolation in the courts of appeals. The Fourth Circuit has ruled, based solely on the current configuration of

the three subprovisions of Section 1640(a)(2)(A), that the $100-$1,000 limitation does not apply to Section 1640(a)(2)(A)(i). In contrast, the Seventh Circuit has determined that the $100-$1,000 limitation *does* apply to that provision. As set forth below, certiorari should be granted now in order to resolve this clear-cut question of statutory interpretation before the disagreement in the courts, and the possibility that other courts of appeals may agree with the Fourth Circuit's view, become the stimuli to much wasteful litigation.

II. BECAUSE THE FOURTH CIRCUIT'S INTERPRETATION OF SECTION 1640(a)(2)(A)(i) VASTLY INCREASES POTENTIAL RECOVERIES ARISING FROM THE MANY MILLIONS OF COVERED TRANSACTIONS OCCURRING EACH YEAR, THE QUESTION PRESENTED BY THIS CASE DEMANDS IMMEDIATE RESOLUTION

The certworthiness of this case, which presents an uncomplicated split between two circuits, rests in major part upon the broad scope of transactions to which Section 1640(a)(2)(A)(i) applies and the significant consequences threatened by its inconsistent application in the courts.

Subpart (i) of TILA's statutory remedy provision covers lender practices relating to a broad range of consumer credit transactions, including vehicle purchases, small loans, payday loans, home equity lines of credit, and credit card plans and periodic statements. 15 U.S.C. § 1640(a)(2)(A)(i); *see also* 15 U.S.C. §§ 1637(a), 1637(b), 1637a, 1638 (coverage of credit card plans, periodic statements, home equity lines of credit, and vehicle purchases and other extensions of closed-end credit, respectively).

Each year American consumers receive more than 16 billion monthly credit card statements for over 1.4 billion U.S. accounts, are issued approximately 150 million new credit cards, receive 180 million payday loans, open millions of new home equity lines of credit, and enter into millions of other

small loan transactions.[10] Moreover, U.S. consumers annually purchase more than 45 million new and used cars, 14.5 million computers, and millions more home appliances, home electronics systems, and home furnishings.[11] Substantial numbers of these purchases – including the vast majority of vehicle sales – are credit financed.[12] All of these credit issuances, loans, and purchases financed by credit are governed by TILA's requirements and subject to Section 1640(a)(2)(A)(i)'s civil liability provision.

Because TILA's compliance requirements are complex, there is significant opportunity for error in the implementation of its provisions. For all transactions covered by TILA, creditors must generate substantial paperwork containing numerous transaction-specific disclosures and technical provisions. *See* 12 C.F.R. §§ 226.5-226.9, 226.17-226.20

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[10] *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, 1165 (2002) (1.44 billion active credit cards in 2000); CardWeb.com, Inc., *Frequently Asked Questions: How Many Cards Are Issued Annually?*, *at* http://www.cardweb.com/cardlearn/faqs/2002/jun/10.amp (last visited Aug. 21, 2003) (credit card issuances); Robert W. Snarr, Jr., *No Cash 'til Payday: The Payday Lending Industry*, Federal Reserve Bank of Philadelphia, COMPLIANCE CORNER, First Quarter 2002, at 1 (payday loans); U.S. CENSUS BUREAU, STATISTICAL BRIEF: HOME EQUITY LINES OF CREDIT 2 (1995), *at* http://www.census.gov/apsd/www/statbrief/sb95_15.pdf (824,000 line of credit originations in 1990); Ruth Simon & Zachery Kouwe, *Why a Rate Cut Might Hurt You*, WALL ST. J., June 25, 2003, at D1 (home equity lines of credit "have exploded in popularity" in recent years).

[11] U.S. CENSUS BUREAU, STATISTICAL ABSTRACT, at 1011 (vehicle purchases); U.S. CENSUS BUREAU, COMPUTERS AND OFFICE AND ACCOUNTING MACHINES: 2001 tbl.2 (2002) (personal computers).

[12] *See* National Automobile Dealers Association, *Financing Tips*, *at* http://www.nada.org/NADAGuides/Finance_Tips.htm (last visited Aug. 21, 2003) (70 percent of new car purchases); Indiana Department of Financial Institutions, *How to Finance a Used Car*, *at* http://www.in.gov/dfi/consumer/pdfs/howfinucar.pdf (last visited Aug. 21, 2003) (majority of used car purchases).

(detailing disclosure requirements); *see also* ROHNER & MILLER, *supra*, § 1.01 (noting creditors' "compliance headaches" generated by "the intricate rules and subrules of the TIL Act and its attendant regulations, commentary, and judicial constructions").

Should inaccuracies be found in the information included by a lender or creditor in these documents, TILA liability applies without affirmative proof of fault. 15 U.S.C. § 1640(a); *see also* ROHNER & MILLER, *supra*, § 12.01[1]; discussion *supra* p. 4. And failure to comply is not a mere possibility: The FDIC has found that TILA is the most commonly violated consumer protection law. *See* FDIC, *Common Compliance Violations*, FIL-61-97 tbl. (Sept. 2, 1997), *at* http://www.fdic.gov/news/news/financial/1997/fil9787b.html (last visited Aug. 21, 2003) (finding that 76% of banks violated TILA in 1996).

Because so many millions of transactions are potentially subject to liability under TILA's Section 1640(a)(2)(A)(i) statutory damages provision, because TILA's disclosure requirements are so easily violated, and because the financial consequences of the Fourth Circuit's interpretation are so dramatic, the present split in the circuits threatens havoc for affected industries and for the courts. With potential liabilities increased from the nominal sum of $1,000 to exposures many times that, lawyers and consumers, not only in the Fourth Circuit but in every other circuit that has not yet addressed the issue, have a newfound incentive to litigate colorable claims from among the many millions of covered transactions.

As the Fourth Circuit majority in this case construed the provision, reading the $100-$1,000 damages cap out of subpart (i), liability increases wildly without any correlation to injury suffered. Instead of prospective defendants owing at most $1,000 on each individual violation of TILA, statutory damages simply equal twice the total finance charges that could ultimately be paid under the loan agreement. That is the derivation of the $24,192.80 award in this case in connection with Respondent's purchase of a used truck. In many

extensions of consumer credit – for an expensive new automobile or under an open-end home equity line of credit, for example – the amount recoverable under the Fourth Circuit's interpretation could well be many multiples of that amount. The potential windfall recoveries available under this reasoning, in the Fourth Circuit and in any circuit that may be moved to adopt its reasoning, provide a substantial incentive for consumers and attorneys to bring suit and pursue litigation. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 188-89 (1994) (noting that uncertainty in interpretation of rules can lead to excessive litigation); *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 (1992) (noting that a clear rule reduces litigation). Given the vast number of covered transactions, the resulting volume of litigation could well be quite large.[13]

TILA's history in the courts illustrates all too plainly how uncertainty about the legal consequences of certain actions can stimulate extensive litigation where so many covered transactions are potentially at issue. In TILA's first decade alone, more than 2,000 TILA and consumer fraud cases were filed annually in the federal courts, accounting for approximately two percent of the federal civil caseload. Truth in Lending: Revised Regulation Z, 46 Fed. Reg. 20,848, 20,942 (Apr. 7, 1981); ROHNER & MILLER, *supra*, § 1.02[2] n.33. During that period, many issues of statutory construction were unsettled, and enterprising consumers and

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[13] This likely consequence is even greater in view of the Fourth Circuit's conclusion that recovery is available regardless of whether the claimant has paid any portion of the financing charge, or even whether the lending agreement has been executed by both parties. (Pet. App. 7a) *But see Bragg v. Bill Heard Chevrolet, Inc. - Plant City*, 245 F. Supp. 2d 1235, 1238 (M.D. Fla. 2003) (disapproving and refusing to follow the Fourth Circuit's holding in *Nigh* that TILA can encompass unfunded financing agreements because the Fourth Circuit's conclusion was based on policy results rather than either the official interpretation of "consummation" under Regulation Z or Virginia contract law).

lawyers were spurred to litigate by the prospects of even a nominal recovery.

As was widely noted at the time, much of this litigation was highly – indeed hyper – technical, and, given the strict liability nature of the statute, involved no showing of fault or ill-will by defendants. *See, e.g., Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1385 (11th Cir. 1984) (Hill, J., dissenting) ("TILA litigation is becoming a game of 'gotcha,' with the 'unwary' credit consumer (or his attorney) holding many wild cards [and] the 'sophisticated' money lender holding more rules and regulations than guiding instructions . . . ."); *Wilson v. Allied Loans, Inc.*, 448 F. Supp. 1020, 1022-23 (D.S.C. 1978) (calling TILA "barratrous legislation" which "transforms loan documents into contest puzzles"); *Simplify and Reform the Truth in Lending Act: Hearings on S. 1312, S. 1501, and S. 1653 Before the Subcomm. on Consumer Affairs of the S. Comm. on Banking, Hous., and Urban Affairs*, 95th Cong. 127-28 (1977) (statement of Sen. Garn) (noting "the ever-growing burden" resulting from "suits based on non-willful technical violations").

This litigation was often driven by pursuit of windfall recoveries for plaintiffs unable to prove any actual injuries and simply seeking to invoke the same statutory damage provision at issue in this case. *See, e.g., Sanders v. Auto Assocs., Inc.*, 450 F. Supp. 900, 902 (D.S.C. 1978) (noting that many "plaintiffs have merely sought a windfall penalty from a lender"); John W. Edmonds & George W. Taylor, *Truth and Consequences*, 35 WASH & LEE L. REV. 367, 391 (1978) (stating that TILA "seems to serve mostly as a trap for the unwary creditor" producing plaintiff windfalls).

The wave of litigation in the early years of TILA ultimately subsided, as many of the ambiguities that were initially present under TILA were clarified by a combination of regulatory action, legislation, and court decisions. *See* Depositary Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 122 (1980); 46 Fed. Reg. 20,848; Christopher L. Peterson, *Truth, Understanding,*

and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act, 55 FLA. L. REV. 807, 890 (2003) (court decisions).

Today, another wave of litigation is threatened not by numerous ambiguities in the statute like those that plagued TILA's first years, but by a single court of appeals decision that dramatically alters the stakes for TILA plaintiffs and defendants. The Fourth Circuit has made it worthwhile for TILA lawyers and plaintiffs to invest more time and money in TILA cases pending not only in that circuit, but in other circuits which may be persuaded to adopt the Fourth Circuit's construction of Section 1640(a)(2)(A). By resolving this conflict in the circuits promptly, this Court can prevent a likely surge of unnecessary litigation.

III. THE FOURTH CIRCUIT'S CONCLUSION THAT THE $1,000 LIMIT WAS RENDERED INAPPLICABLE TO SECTION 1640(a)(2)(A)(i) BY THE 1995 AMENDMENT IS NOT SUPPORTED BY ANY REASONABLE READING OF THE STATUTORY LANGUAGE AND HISTORY

The court below erred by radically increasing the amount recoverable under TILA's thirty-five year old remedy provision based on twice the finance charge, without the hint of a suggestion that Congress ever intended to make such a change. As discussed above, *see supra* pp. 4-5, when TILA was originally enacted in 1968, the relevant provision contained only the measure of recovery now at issue, with the $100 and $1,000 minimum and maximum. Consumer Credit Protection Act § 130(a). Plainly, at that time, a recovery of twice the finance charge could not exceed $1,000.

When Congress amended the provision in 1976 to insert a second damages clause relating to consumer leases, *see* 15 U.S.C. § 1640(a)(2)(A) (1976), the language and legislative history of the statute confirmed that Congress did not intend to alter the application of the $100-$1,000 limitation to the original measure of liability based on "twice the amount of the

finance charge." *See* discussion *supra* p. 5. Accordingly, the courts uniformly continued to apply the limitation. *See Purtle*, 91 F.3d at 800; *Cowen*, 70 F.3d at 941; *Mars*, 713 F.2d at 67; *Dryden*, 661 F.2d at 1191 n.7.

Finally, Congress amended the TILA statutory remedy provision in 1995 to add a new subpart (iii), creating a basis of liability for closed-end loans secured by real estate with a liability limitation of "not less than $200 or greater than $2000." The enactment by which that change was made reads, in its entirety, as follows:

> Sec. 6. CALCULATION OF DAMAGES
>
> Section 130(a)(2)(A) of the Truth in Lending Act (15 U.S.C. 1640(a)(2)(A)) is amended –
>
> (1) by striking "or (ii)" and inserting "(ii)"; and
>
> (2) by inserting before the semicolon at the end the following: ", or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000".

Truth in Lending Act Amendments of 1995 § 6. Under the reasoning of the court below, this legislation rendered the $100-$1,000 limitation inapplicable to subpart (i). Yet, other than deletion of the single word, "or," nothing in this enactment addresses the pre-existing law in any way. And while the legislative commentary accompanying this amendment explains the reasons for setting a higher cap on closed-end real estate loans, it mentions nothing about the much more radical change asserted by the court below – the entire removal of the cap on recoveries under subpart (i), which all agree has applied since the statute's original enactment. *See* discussion *supra* pp. 6-7.

This fact is deemed irrelevant under the Fourth Circuit's reasoning – which simply involves a snapshot of the words of the statute as it now reads and a militant inattention to other interpretive tools. The Fourth Circuit's blindered reading of

the statute contravenes this Court's direction that statutory construction is a "holistic endeavor" which "must not be guided by a single sentence or member of a sentence" at "the risk of distorting a statute's true meaning," but instead must be guided by "the provisions of the whole law, and . . . its object and policy." *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454-55 (1993) (quotations and citations omitted).

Moreover, this Court has counseled against reading a major change into a statutory provision based on an amendment which makes little or no modification to the provision in question, when the legislative history indicates no basis for that change. *See Almendarez-Torres v. United States*, 523 U.S. 224, 233-34 (1998) (stating that neither the language nor the legislative history of an amendment which made a certain subsection parallel to a later enacted subsection suggested that "Congress intended to change, or to clarify, the fundamental relationship between the two subsections"); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 176 (1993) (rejecting asserted interpretation of amendment to statute because "[i]t would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect" in the legislative history); *Clarke v. Sec. Indus. Ass'n, Sec. Pac. Nat'l Bank*, 479 U.S. 388, 405-06 (1987) (rejecting asserted change in statutory meaning by changing certain words when there was "nothing in the legislative history . . . indicating that this change in the wording had substantive significance"); *McElroy v. United States*, 455 U.S. 642, 650 n.14 (1982) (concluding that "Congress intended nothing by the change in language" "[b]ecause the legislative history contains no indication that the variation in the language had changed the meaning" of the statute).

But the incorrectness of the decision below does not rest simply on its ascribing to the 1995 legislation a radical and inexplicable change in the meaning of Section 1640(a)(2)(A)(i) without any material change in the pre-

existing language or any hint of a legislative purpose to effectuate such a change. It rests as well on the fact that the court's literalist, plain-meaning approach gives at best an untidy account of the words of the resulting statute.

First, as Judge Gregory noted in his dissent, the majority opinion necessarily dances around the words "under this subparagraph," as they appear in both the pre- and post-1995 versions of the $100-$1,000 liability limitation, and ultimately explains its result on the ground that the "subparagraph" referred to after 1995 is different from the one referred to previously. (Pet. App. 20a-21a) All courts agree that the "subparagraph" referenced in the pre-1995 statute was Section 1640(a)(2)(A), not simply subpart (ii), just as the similar reference in Section 1640(a)(2)(B), both before and after 1995, necessarily refers to all of subsection (B). *See, e.g., United States Nat'l Bank of Oregon*, 508 U.S. at 460 (presuming that "identical words used in different parts of the same act are intended to have the same meaning") (quotation omitted). Yet the majority concludes that the meaning of "subparagraph" as used in Section 1640(a)(2)(A) was changed by the addition of subpart (iii), and now refers only to subpart (ii), rather than to the two pre-existing provisions of what had always been subparagraph A.[14] Further, as Judge Gregory pointed out, the court's reading renders the words "under this subparagraph" superfluous, since both the $100-$1,000 limitation at the end of subpart (ii), in which those words appear, and the $200-$2,000 limitation at the end of subpart (iii), in which they do not, are construed to apply only to the individual subpart and not to any other portion of subparagraph (A). (Pet. App. 21a)

Second, the majority's interpretation of the relationship between subparts (i) and (ii) creates a serious problem for the application of subpart (iii). According to the court, the addition of subpart (iii) in 1995 altered the reasonable

[14] Obviously, the phrase "liability under this subparagraph shall not be less than $100 nor greater than $1,000" cannot apply to subpart (iii), which carries its own explicit $200-$2,000 limitation.

understanding of the pre-existing two provisions by bringing the $100-$1,000 limitation wholly within subpart (ii). As a result, said the court, "the far better, . . . indeed [the] compelled, interpretation" was that the limitation ceased to apply to subpart (i), in which it had originally been enacted, and to which it had always applied. If that conclusion is indeed *compelled* by the simple juxtaposition of the three subparts, without any other basis in history or logic to support it, then presumably we must consistently refrain from importing by inference into one subpart of this section language omitted there but included in another subpart. But if that principle is the guide, then there is a serious problem with the application of subpart (iii), which applies to certain credit transactions secured by real property and says only that the recovery shall be governed by the $200-$2,000 limitation. Although subpart (iii) says nothing about how the underlying liability shall be calculated, sensibly, courts have read this provision as including by implication the "twice the amount of the finance charge" formula that is expressly included in the parallel language of subpart (i). *See, e.g., In re Ralls,* 230 B.R. 508, 522 (E.D. Pa. 1999) (holding that statutory damages under subsection (iii) "are measured by double the amount of the finance charges imposed in the transaction up to $2,000"); *accord In re Murray*, 239 B.R. 728, 734 (E.D. Pa. 1999). But if it is inappropriate, as the court found, to read language appearing in one subpart into another, then this conclusion cannot be justified, and subpart (iii) must be read as providing only a cap and floor on any recovery without providing any formula for determining its amount.

Accordingly, the decision below is certainly not compelled by the statutory language and, moreover, creates as many problems as it addresses. The fact that Congress's syntax may lack perfect symmetry does not justify the adoption of a construction that, in light of the Act's history and all available indicia of purpose and intent, is implausible in the extreme. *See, e.g., Caron v. United States*, 524 U.S. 308, 315 (1998) (refusing to read statute in a way that yields "bizarre" "results

contrary to a likely, and rational, congressional policy"); *Moreau v. Klevenhagen*, 508 U.S. 22, 33-34 (1993) (reading statutory phrase in the "most plausible" manner consistent with the regulations); *United States v. Hohri*, 482 U.S. 64, 70-72 (1987) ("determining the more plausible interpretation" of statutory language by investigating congressional intent).

Finally, the Fourth Circuit's interpretation, which mandates statutory damages of twice the finance charge with no maximum cap regardless of any actual injury to the plaintiff or bad intent by the defendant, may open up subpart (i) to a constitutional challenge. This Court recently made clear that "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property" in violation of the due process clauses of the Fifth Amendment. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003); *see also Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 434-35 (2001) (stating that constitutionality of award turns on "the degree of the defendant's reprehensibility or culpability," "the relationship between the penalty and the harm to the victim caused by the defendant's actions," and "the sanctions imposed in other cases for comparable misconduct"). Because the result below affords compulsory, uncapped, and potentially sizable statutory damage awards for minor, technical, and non-intentional TILA violations, it at least raises a question under the Fifth Amendment's due process clause and, as a result, should be rejected if another reasonable interpretation is available. *See, e.g., NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 507 (1979) (admonishing that statutes should *not* be construed in a manner "that in turn could call upon the Court to resolve difficult and sensitive questions" of constitutional law).

CONCLUSION

The petition for writ of certiorari should be granted.

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September ___, 2003

APPENDIX

**UNITED STATES COURT OF APPEALS,
FOR THE FOURTH CIRCUIT.**

Bradley NIGH, Plaintiff-Appellee,

v.

**KOONS BUICK PONTIAC GMC, INCORPORATED,
Defendant-Appellant,**

and

Household Automotive Finance Corporation, Defendant.

Bradley Nigh, Plaintiff-Appellant,

v.

**Koons Buick Pontiac GMC, Incorporated; Household Automotive Finance
Corporation, Defendants-Appellees.**

Nos. 01-2201, 01-2224.

Argued Oct. 28, 2002.
Decided Feb. 4, 2003.

Before LUTTIG, WILLIAMS, and GREGORY, Circuit Judges.

Affirmed by published opinion. Judge LUTTIG wrote the opinion for the court. Judge WILLIAMS wrote an opinion concurring in part and concurring in the judgment in part. Judge GREGORY wrote an opinion concurring in part and dissenting in part.

OPINION

LUTTIG, Circuit Judge.

Bradley Nigh sued Koons Buick Pontiac GMC, Inc. (Koons Buick) for claims under the Truth In Lending Act (TILA), the

Federal Odometer Act (FOA), and the Virginia Consumer Protection Act (VCPA), along with numerous claims sounding in contract, fraud, and conversion, all in connection with his purchase from Koons Buick of a used 1997 Chevrolet Blazer. Koons Buick filed a counterclaim for breach of contract and fraudulent and negligent misrepresentation. At summary judgment, the district court granted judgment on several claims and all the counterclaims. Some of Nigh's TILA, FOA, and VCPA claims survived for a jury trial and resulted in a verdict finding Koons Buick liable for $24,192.80 under TILA, and for $4,000.00 under the VCPA. Koons Buick appeals from the jury's verdict, as well as from several of the court's orders. Nigh, in a cross-appeal, also challenges several of the court's orders. Finding no error in the verdict or the court's rulings, we affirm the judgment below.

I.

This case arose from Koons Buick's sale of a truck to Bradley Nigh. The sale was not a simple cash-for-product exchange, but involved a somewhat tortured effort by Koons Buick to provide Nigh consumer financing. Nigh first went to Koons Buick on February 4, 2000. While there, he decided to trade in his prior vehicle and buy the Blazer. To complete the sale, he executed a Buyer's Order, reflecting the proposed purchase, and a "Retail Installment Sales Contract" (RISC I), reflecting the proposed financing. The Buyer's Order and RISC I both reflected that Nigh would pay $4,000 down, and trade in his prior vehicle. Nigh received no price reduction for his trade-in because he estimated its remaining loan balance to equal the price Koons Buick gave him for it, but he also agreed to pay off any excess balance over the estimate. Nigh, having signed the contracts and turned them over to Koons Buick, was committed to the transaction and obliged to perform upon counter-signature by Koons Buick. Koons Buick did not counter-sign the documents as Nigh signed them, but intended to sign only once a lender agreed to buy an assignment of the installment payments owed under RISC I.

The transaction's closing and the completion of Nigh's purchase were thus left within the dealership's unilateral control.

Nigh left the dealership in the Blazer, on the authority of a temporary certificate of ownership issued under Va. Code § 46.2-1542. Nigh left his trade-in vehicle behind, in anticipation that a lender would purchase assignment of the payments owed under RISC I and the transaction would close. Koons Buick, however, was unable to find a willing lender. Consequently, it restructured the deal to require an additional $2,000 down payment. The dealership represented this change to Nigh as a "better deal" at a lower rate, necessitating a new RISC (RISC II). Nigh returned to the dealership on February 25 based on this representation, but told Koons Buick he did not have an additional $2,000. He asked to return the new truck, retrieve his trade-in vehicle, and walk away from the deal. Koons Buick, however, told him he could not withdraw because it had sold his trade-in. Nigh, unaware of this statement's falsity, and at a loss, signed RISC II and a $2,000 Promissory Note to cover the added down payment.

Koons Buick, again unable to find a willing lender, called Nigh back. Nigh alleged the dealership told him, via a message left with his brother, that he had to come back to sign a new RISC (RISC III) or it would report the Blazer as stolen. Afraid of arrest, Nigh returned to the dealership on March 5, and under protest, signed RISC III with a back-date of February 25. Koons Buick later closed the transaction by executing the contract documents and selling assignment of RISC III's installment payments to Household Automotive Finance Corporation (HAFC).

Afterwards, Nigh learned that his trade-in vehicle had been repossessed from the Koons Buick lot by its note-holder because Nigh, believing the vehicle to have earlier become property of Koons Buick, failed to make required payments. Nigh also learned that one of the reasons Koons Buick had

been unable to get a lender to accept RISC II was that it contained an unaccounted for charge, later determined to be for a product whose sale to Nigh had not been properly documented, which Nigh did not recall seeing on the transaction documents, and which he never requested, agreed to accept, or received. The product, a Silencer car alarm, was listed on the second Buyer's Order and on RISC II at a price of $965. But absent from the transaction documents was a Silencer "we owe" form, which is used in retail car sales to document the sale of "after market" products in financed transactions. Disgruntled by the whole affair, Nigh made no payments on the truck and returned it to Koons Buick with a letter asserting a right to rescission. HAFC repossessed the truck from the dealership's lot because Nigh made no payments.

Nigh, claiming that Koons Buick defrauded him, brought this action under the statutory authority of TILA, FOA, and the VCPA, and under the common law. Koons Buick counterclaimed for breach of contract. The district court granted summary judgment to Koons Buick on its counterclaims and on many of Nigh's claims, but preserved for trial limited claims under TILA, FOA, and the VCPA. At trial, Nigh prevailed on his TILA claim that Koons Buick intentionally included the charge for the Silencer on RISC II without a basis for the charge, and on his VCPA claim that Koons Buick violated the VCPA by telling him that he did not have valid possession of the Blazer in order to induce him to sign RISC III. The court issued a Supplemented and Final Judgment on August 15, 2001, three months after trial, to clarify its summary judgment ruling on Koons Buick's counterclaims. This order is the proceeding's final judgment, from which appeal is now had.

II.

As a preliminary jurisdictional matter, Nigh contends that Koons Buick did not timely file a notice of appeal. His

objection was already addressed by a motions panel of this court, and denied for lack of merit. The district court filed a Supplemented and Final Judgment on August 15, 2001, and it is against this date that the notice of appeal's timeliness must be measured, irrespective of the fact that the court had earlier filed a Final Judgment and had set a subsequent date at which point notice of appeals tolling would end. Assessed in light of the August 15, 2001, order, Koons Buick's notice was timely.

III.

The parties raise a variety of claims on appeal, none of which merit reversing the district court's conclusions of law or the fact-finder's determinations, but which we address in turn, beginning first with Koons Buick's claims.

A.

Koons Buick attacks the district court's denial of summary judgment on Nigh's claim that RISC II constituted a TILA violation on several grounds. First, Koons Buick argues that because RISC II was never counter-signed, it is an unfunded financing agreement and cannot form the basis for TILA liability. Under what is commonly known as Regulation Z, creditors operating under 15 U.S.C. § 1638(b)(1), which governs this transaction, must "make [TILA] disclosures *before consummation* of the transaction," 12 C.F.R. § 226.17(b) (emphasis added); *cf.* 15 U.S.C. § 1638(b)(1) ("disclosures . . . shall be made *before the credit is extended*" (emphasis added)). TILA liability, however, cannot accrue *until* a credit transaction is consummated, or put another way, "until credit is in fact extended," *Baxter v. Sparks Oldsmobile, Inc.*, 579 F.2d 863 (4th Cir. 1978) (holding that a signed buyer's order that contemplated an installment sales contract did not constitute an extension of credit and so no TILA violation occurred), since until credit is extended to a person in a particular transaction there are no credit terms against which to assess a disclosure's accuracy. The pertinent legal

question then is what consummation of a credit transaction, or extension of credit, encompasses.

Regulation Z defines consummation as the "time that a *consumer* becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2 (emphasis added). Under this regulation, a number of courts have held that consummation, or extension of credit, can encompass unfunded financing agreements. *See, e.g., Johnson v. Steven Sims Subaru, Inc.*, 1993 WL 761231 (N.D. Ill. 1993); *Bryson v. Bank of New York*, 584 F. Supp. 1306 (S.D.N.Y. 1984); *Madewell v. Marietta Dodge, Inc.*, 506 F. Supp. 286 (N.D. Ga. 1980); *Copley v. Rona Enterprises, Inc.*, 423 F. Supp. 979 (S.D. Ohio 1976); *see also Dryden v. Lou Budke's Arrow Finance Co.*, 630 F.2d 641 (8th Cir. 1980) (holding that an unenforceable transaction was an extension of credit). We agree with this rule because the regulation expressly refers *solely* to the consumer's commitment and because TILA's express purpose of protecting consumers from receiving inadequate disclosures prior to *their* entering into credit transactions could not otherwise be effectuated. If consummation, or extension of credit, does not encompass a consumer's commitment to a financing agreement that provides unilateral power for the creditor to execute the agreement later, creditors could intentionally provide faulty disclosures to consumers, obtain their commitment, and then afterwards provide accurate disclosures prior to closing the transaction, which if provided earlier might have dissuaded the consumer from accepting the credit, all without incurring TILA liability. As the *Bryson* court noted:

> [T]he point at which the consumer . . . commits himself or herself to the purchase of credit, without regard for the degree of commitment of the lender . . . [is the point at which] the consumer becomes vulnerable to actual damage from the lender's inadequate or deceptive disclosures, for at this time he or she can be contractually bound to the terms of the lending contract at the option of the lender.

Bryson, 584 F. Supp. at 1317 (emphasis added). Consequently, we conclude that consummation, or extension of credit, under § 1638 encompasses unfunded, financing agreement options to which consumers contractually commit, and under which they can be bound at the lender's sole discretion. Here, Nigh's signing of RISC II and his giving over of the signed documents to Koons Buick worked his commitment and constituted consummation, or an extension of credit. Thus, the district court properly concluded that liability attached "when Nigh made the choice and committed himself to the purchase of credit," *Nigh v. Koons Buick Pontiac GMC, Inc.*, 143 F. Supp. 2d 535, 549 (E.D. Va. 2001).

Koons Buick next attacks its TILA liability by arguing that, since the second Buyer's Order Nigh signed has a line-item listing the Silencer product for a price of $965, RISC II's disclosures were accurate, and thus do not violate TILA. But, for several reasons this claim also fails. First, the dealership conceded from the outset of this action that the $965 charge was a mistake and thus, by necessary implication, that RISC II was inaccurate. *See* Field Affidavit, J.A. at 252 (owner and president of Koons Buick admitting that "[p]laintiff should not have been charged for a silencer" and explaining that as a result "a third [RISC] was prepared"); *see also* Defendant's Responses to Plaintiff's First Set of Requests for Admissions, J.A. at 817 ("Admit that a charge of $965.00 was included on the second Buyer's Order for a "silencer." *Admitted that the charge was included in error*." (emphasis added)). Indeed, it was on the basis of these admissions that Koons Buick argued on summary judgment that it was due judgment under the affirmative defense of 15 U.S.C. § 1640(c), a bona fide *error* defense available to creditors who show that their TILA error was not intentional, but was a good faith mistake.[1] Koons Buick also argued on these admissions of error that if §

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[1] The jury ultimately rejected this defense, finding that Koons Buick "intentionally includ[ed]" the Silencer charge.

1640(c) did not apply, then § 1640(b) did, which provides an affirmative defense for lenders who have timely made corrections to their TILA errors.[2] Having conceded by affidavit, admission, and legal argument that the Silencer line-item was in error, Koons Buick cannot now contend that it was not in error and thus that RISC II was accurate.

Second, Koons Buick waived the legal argument that the congruence between the Buyer's Order and RISC II proves that RISC II accurately disclosed the transaction by virtue of the fact that it makes the argument for the first time here in the Court of Appeals. Though Koons Buick asserts in its briefs that it raised this legal objection earlier in the proceedings, its assertion is unsupported by the record. The citation to which Koons Buick directs the court records its argument at the start of trial, and *after* the summary judgment proceedings were concluded. *See* J.A. at 317-20. And though that trial exchange contains Koons Buick's assertion that RISC II accurately disclosed the transaction by virtue of its congruence with the second Buyer's Order, it noted this objection *only in furtherance of its argument that the error in RISC II was an innocent error*:

> When a mistake was discovered in the buyer's order agreement, there was a new retail installment contract which changed the APR and lowered the APR. That's the kind of mathematical error, assuming this was a TILA violation to start with that the correction of errors was designed to address.
>
> . . . .
>
> So, to the extent to which it's a TILA violation—and I'm not quite even [sure] it's a TILA violation because the first—[RISC II] was accurate as to the deal that both parties

[2] The district court correctly rejected this defense because Koons Buick never notified Nigh of the error.

> mistakenly agreed to. And certainly, Mr. Nigh having signed it, is not in a position to later come back and say he was unfairly taken advantage of.
>
> *So, your Honor, we believe that in ruling that we're not entitled to the [§ 1640(b)] defense for correction of errors, that the Court is incorrect.*

(J.A. at 318-20).

Lastly, but equally fatal to Koons Buick's argument is the fact that the jury, after being properly instructed on the law, rejected Koons Buick's claim that the Buyer's Order provided a basis for RISC II's Silencer charge. We do not speculate as to the substance of a jury's factual determination, and only inquire whether sufficient evidence supported the verdict.

The verdict form read as follows:

> Do you find that Koons violated the Truth in Lending Act by intentionally including a charge for a "Silencer" on the Retail Installment Sales Contract signed on February 25, 2000 with knowledge that there was *no basis* for the charge?

(J.A. at 763) (emphasis added). The jury answered "Yes." *Id.* Having evaluated the exhibits and the testimony, the jury decided that the *apparent* congruity between the Buyer's Order and RISC II did not constitute a basis for RISC II's Silencer line-item. The jury's conclusion that there was no basis, from the Buyer's Order or any other document, for RISC II's Silencer line-item could well have been based on a determination that some portion of the transaction documents were unreliable, a determination supported by the record's disclosure that Nigh executed no "we owe" form for the Silencer and that HAFC noticed this unusual absence, *see* J.A. at 769, and by Mr. Nigh's testimony that he never noticed a charge for the Silencer when he signed the second Buyer's Order and RISC II, *see* J.A. at 479-82. The jury's finding of liability was sufficiently supported by this evidence.

Koons Buick's last challenge to the TILA judgment involves the court's application of the statutory damages cap that 15 U.S.C. § 1640(a)(2)(A) establishes for TILA liability. Koons Buick contends that the court erred in allowing statutory damages of twice the finance charge in connection with the transaction, citing *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983) (summarily interpreting § 1640(a)(2)(A) to cap TILA statutory damages in all individual actions at $1,000). Koons Buick's reliance on Mars is misplaced.

In 1983, when Mars was decided, the act read as follows:

> (a) . . . any [TILA violator] is liable to such person in an amount equal to the sum of—
>
> . . . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, *or* (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1,000[.]

§ 1640(a)(2)(A) (1980) (emphasis added). In 1995, however, Congress amended the act to read as follows:

> (a) . . . any [TILA violator] is liable to such person in an amount equal to the sum of—
>
> . . . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the

> liability under this subparagraph shall not be less than $100 nor greater than $1,000, *or* (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, *not less than $200 or greater than $2,000*[.]

§ 1640(a)(2)(A) (1995) (emphasis added).

The *Mars* decision plausibly interpreted the phrase "under this subparagraph" to apply to the whole of subparagraph (A) in 1983. But the 1995 amendment, by striking the "or" preceding (ii), and inserting (iii) after the "under this subparagraph" phrase, rendered *Mars'* interpretation defunct. Whereas in 1983 it was plausible to interpret the maximum and minimum provision as coming at the end of subparagraph (A), and not exclusively within subparagraph (ii), the new provision clearly places that clause wholly within (ii). Of even greater importance, the provision now expressly sets a statutory maximum and minimum in subparagraph (iii) that is different from that provided in the pre-existing maximum and minimum clause. The inclusion of the new maximum and minimum in (iii) shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii). As a consequence of the 1995 amendment, the damages that may be awarded under subparagraph (i) are now simply "twice the amount of any finance charge *in connection with the transaction*," and the court's instruction that if Koons Buick violated TILA Nigh was "entitled to twice the [entire] finance charge" was proper.

Judge Gregory's disagreement with this analysis is founded on the mistaken conclusion that we must conclude that Congress abrogated *Mars* in order to reach our decision here. *See post* at 131. Of course, when a statute has been amended we interpret the new statute, not the old, and any prior opinion

interpreting the old statute is necessarily brought before us for review so that we may ascertain whether the logic of that prior interpretation still applies to the new statutory language. Our responsibility is thus not to determine whether there is evidence that "Congress intended to override the Fourth Circuit's" precedent (or any circuit precedent for that matter), as Judge Gregory believes. *See post* at 131. The questions before this court, and that which we address above, are simply whether Congress amended the statute in a way relevant to the prior interpretation, and if it did, what does the amended statute mean.

Furthermore, though Judge Gregory thinks our analysis necessarily implies that Congress "changed the meaning of the word 'subparagraph,'" *see post* at 132, it does no such thing. As explained above, Congress' amendment requires that the reference point of the "under this subparagraph" clause be the subparagraph of § 1640(a)(2)(A)(ii), and not the subparagraph of § 1640(a)(2)(A). Indeed, it is Judge Gregory who would have this court change the meaning of the term "subparagraph," as his analysis would ignore the plain reading of that term and instead conclude that it was either meant in the plural, thus referencing subparagraphs (i) and (ii), or that it was a term of art not referencing a distinct subparagraph at all.

Judge Gregory's conclusion that our reading of the "under this subparagraph" clause creates surplusage in the statute's construction and "inconsistency" among its parts is equally flawed. *See post* at 132. Indeed, if the "under this subparagraph" clause had been omitted from the amended statute, Judge Gregory would have a much better case for his interpretation. Had that occurred, he could argue that Congress intended the maximum and minimum codified in (ii) to apply to both (i) and (ii), using a comma preceding the maximum and minimum to set it off from (ii) and to show its applicability to (i) and (ii), and not using language that requires identifying a distinct subparagraph to which to apply

the maximum and minimum. Thus, rather than being surplusage, the inclusion of the "under this subparagraph" clause not only enables, but actually compels, the reading we give the statute by applying the maximum and minimum limits to a distinct subparagraph.

Nor does the clause create "inconsistency" among the statute's parts either. Just because Congress did not use the same terminology to restrict the maximum and minimum in (iii) to that subparagraph as it did to restrict the maximum and minimum in (ii) to that subparagraph, it does not follow that "Congress must have meant the statutory caps . . . to have different applications," *see post* at 132. That fact leads only to the conclusion that the plain language of each must be interpreted individually to ascertain its meaning.

It could well be, as Judge Gregory concludes, that Congress did not intend to alter the statutory cap applicable under subparagraph (A)(i) when it amended the statute in 1995. However, the critical point of law—and it is critical—is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. And, based upon that statute, the far better, and indeed compelled, interpretation is that Congress did alter the statutory cap regardless of its intent. It is the statute, not any inferential intent, that constitutes the law. Of course, it goes without saying, if Congress enacted into law something different from what it intended, then it can simply amend the statute to bring the statute in line with congressional intent. In this way, and in this way only, are the constitutional roles of the legislature and the courts respected.

Koons Buick's last substantive attack on the district court's rulings involves the grant of summary judgment on its counterclaims. The dealership argues that the court erred by reversing, post-trial, its pre-trial grant of summary judgment with respect to installment payments owed by Nigh under RISC III. But the court did not err in this regard, because it

did not reverse itself. As the court made clear, the Supplemented and Final Judgment, filed after trial, did not change the court's pre-trial holding; it simply "clarifie[d]" it (J.A. at 894). Admittedly, in granting summary judgment on the counterclaims, the court held that Nigh breached his contractual obligations in three ways: 1) failing to pay off the excess loan balance on his trade-in, which exceeded his estimate; 2) failing to pay on the $2,000 Promissory Note; and 3) failing to make installment payments. But the court calculated damages to *Koons Buick* only for the first two. It found Koons Buick entitled to $1,959.73 for the excess pay-off amount, and $2,000.00 for the Promissory Note. The court *never* said Koons Buick was entitled to the installment payments Nigh failed to make to HAFC; it never calculated damages to Koons Buick from this breach; and it never concluded that Koons Buick was entitled to any award for it.

Koons Buick, meanwhile, asserts it is entitled to the $30,000 due under RISC III since the court found that Nigh breached his installment payment obligations, even though it sold those rights to HAFC and HAFC repossessed the Blazer upon Nigh's breach. The dealership argues it is entitled to damages for the breach because it was the *assignor* of the sales contract. *See Carozza v. Boxley*, 203 F. 673, 677 (4th Cir. 1913) (noting that either an assignor or an assignee can sue on a defaulted contract). It further argues that even if it may not recover under *Carozza*, it may recover on HAFC's rights in order to preclude its own liability under Va. Code § 8.01-13, which allows assignees to recover against assignors of defaulted writings.

Both contentions fail. Koons Buick's counterclaim pleading *nowhere* refers to either installment payments or its status as an assignor. *See* Koons Buick's Answer and Counterclaim (J.A. at 63). Thus, Koons Buick did not put Nigh or the court on notice that it was suing on the installment payments, or under any assignment based theory, as would have been required for it to recover on the breach. *See* Fed. R.

Civ. P. 8; *Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995) (a "pleaded claim [must] afford the opposing party fair notice of the nature and basis or grounds of the claim and a general indication of the type of litigation involved") (citations omitted). Though the court found that Nigh breached his RISC III payment obligations, it made no award on this basis to Koons Buick, and Koons Buick, having failed to plead on this basis, was due no award. The Supplemented and Final Judgment properly clarified this point.

Koons Buick also appeals the VCPA judgment. That judgment, however, was supported by properly admitted evidence and was sufficient to establish that Koons Buick made material misrepresentations to Nigh. These misrepresentations were intended to deceive, did deceive, and caused loss; and the jury's verdict may not be set aside. Koons Buick lastly challenges the district court's rulings on both parties' motions for costs and attorney fees. Its objections are without merit; the court did not abuse its discretion in reaching cost and fee determinations.

B.

Nigh contends on his cross-appeal that the district court erred in granting summary judgment to Koons Buick on two claims. First, he argues that the court should have allowed him to proceed to trial on his TILA claims involving RISC III. Nigh submits that since RISC III, though signed on March 5, was back-dated to February 25, it resulted in interest being accrued as of February 25, and thus necessitated that TILA disclosures also be given as of that date. Since Nigh did not receive the disclosure documents for RISC III until March 5, he reasons that Koons Buick violated TILA and did not deserve summary judgment on the claim. Nigh's argument, though superficially clever, is without merit. While he was liable for monies *calculated* from February 25 on, he did not *become liable* for, those monies until March 5, by which point he had received the material disclosures. As Nigh himself

points out, "TILA required Koons to provide Nigh with [the] disclosures . . . prior to the consummation of the transaction," Appellee's Br. at 44, and "the parties did not sign [RISC III] until March 5, 2000," *id.* at 46.[3]

Nigh also argues that the court erred by rejecting his claim to be entitled to rescission under Va. Code § 46.2-1542 as a result of Koons Buick's allegedly untimely transfer of title. Though Nigh was given a temporary ownership certificate governed by § 46.2-1542 upon signing RISC I, Nigh and Koons Buick executed a reassignment of title within thirty days, validly transferring title before the statutory deadline and depriving Nigh of a claim to rescission. *See* J.A. at 778 (DMV records establishing that the title transfer date for the Blazer was February 25, 2000).

CONCLUSION

The judgment of the district court is affirmed.

AFFIRMED.

WILLIAMS, Circuit Judge, concurring in part and concurring in the judgment in part.

I concur in sections II and III.B of the majority opinion. I concur in section III.A of the majority opinion with the exception of that part of the majority opinion analyzing the issue of whether RISC II was inaccurate, *see ante* at 124 - 126. I agree that "Koons Buick waived the legal argument that the congruence between the Buyer's Order and RISC II proves that RISC II accurately disclosed the transaction," *ante* at 124,

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[3] Because Nigh only argued on appeal that the back-dating of RISC III caused its accompanying disclosures to be untimely, we do not properly have before us the related question, addressed by the district court in *Rucker v. Sheehy Alexandria, Inc.*, 228 F. Supp. 2d 711 (E.D. Va. 2002), of whether such back-dating might affect the accuracy of the accompanying disclosures.

and thus, I concur in the judgment as to this part and would not reach the analysis of this issue.

GREGORY, Circuit Judge, concurring in part and dissenting in part.

I.

I write separately to dissent solely from the Court's reading of 15 U.S.C. § 1640(a)(2)(A)(1998). I would find that Congress, with the 1995 amendments to TILA, did not change the application of the $1,000 cap in § 1640(a)(2)(A)(ii). Because the cap still applies to (2)(A)(i), I would find that the district court erred in granting Nigh damages in excess of that statutory limit.

II.

On appeal, Koons argues that the district court improperly instructed the jury on the measure of damages for Nigh's claim under TILA. The district court informed the jury that, pursuant to TILA, damages were to be equal to "twice the amount of any finance charge in connection with the transaction." § 1640(a)(2)(A)(i); J.A. at 764. Based on this instruction, the jury awarded Nigh $24,192.80 on his TILA claim. Koons insists that the $1,000 statutory cap in § 1640(a)(2)(A)(ii) applies to the calculation of damages under (2)(A)(i), and that the district judge should have reduced the award accordingly.

Before the 1995 amendments to TILA, 15 U.S.C. § 1640(a) read, in pertinent part, as follows:

> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part . . . with respect to any person is liable to such person in an amount equal to the sum of—. . .
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action

relating to a consumer lease under part E of this subchapter, 25 per centum of the total monthly payments under the lease, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1000; or

(B) in the case of a class action, such amount as the court may allow, except that . . . the total recovery *under this subparagraph* . . . shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor . . . .

15 U.S.C. § 1640(a)(1994) (emphasis added). That is, subparagraph (A) concluded with the qualification that "liability under this subparagraph shall not be less than $100 nor greater than $1,000." Both parties concede—and it is Fourth Circuit law—that this limitation applied to the entire subparagraph, both subsections (2)(A)(i) and (2)(A)(ii). *See Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65, 67 (4th Cir. 1983). *See also Strange v. Monogram Credit Card Bank of Ga.*, 129 F.3d 943, 947 (7th Cir. 1997) (citing *Mars*).

This reading of the statute was buttressed by the use of the same "under this subparagraph" language in § 1640(a)(2)(B), which stated (and still states), "[T]he total recovery *under this subparagraph* . . . shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor." (Emphasis added). The plain reading of the pre-1995 statute was that there was one statutory cap on damages under subparagraph (B) and a separate cap under subparagraph (A). The use of the phrase "under this subparagraph" in relation to both limits made it clear that the caps were applicable to the whole of their respective subparagraphs. This was the reading of the statute adopted by the *Mars* Court, and it is an interpretation by which this panel is still bound.

In 1995, however, Congress amended the statute to add (2)(A)(iii), relating to real estate transactions. The current statute reads, in relevant part:

(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total monthly payments under the lease, except that the liability *under this subparagraph* shall not be less than $100 nor greater than $1000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2000 . . . .

15 U.S.C. § 1640 (1998) (emphasis added). The 1995 amendments did not include any wholesale changes to the statute; the newly drafted third clause was simply tacked on to the end of the subparagraph. Still, with the addition of (2)(A)(iii), the phrase "under this subparagraph" cannot apply to all of (2)(A) as Congress initially intended, because it does not apply to (iii), which has its own cap of $2,000. Thus, the question before this Court is whether Congress meant to change the application of the statutory cap, and thus abrogate *Mars v. Spartanburg Chrysler Plymouth* by adding (2)(A)(iii) to the statute.[1]

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[1] The majority claims that its holding is supportable without concluding that *Mars* has been abrogated because the 1995 amendments present this Court with a "new statute" that was not before the *Mars* Court in 1983. *Ante*, at 127. The Court explains, "The *Mars* decision *plausibly* interpreted the phrase 'under this subparagraph to apply to the whole of subparagraph (A) in 1983. But the 1995 amendment . . . rendered *Mars'* interpretation defunct." *Ante*, at 126 (emphasis added). As a preliminary matter, I have trouble understanding the material distinction between a congressional act that renders a court's interpretation defunct and an act that abrogates that same interpretation. Regardless, the amendments do not create a new statute, but simply append a third clause to the original law. Thus, to reach its result the majority must either: (1) overrule *Mars* (which it cannot do); or (2) find that *Mars* has been abrogated. The majority effectively recognizes this fact when it states that the "prior [*Mars*] opinion . . . is necessarily brought before us for review so that we may ascertain whether

I would find that *Mars* is still good law because there is no evidence that Congress intended to override the Fourth Circuit's long-standing application of the $1,000 cap to both (2)(A)(i) and (2)(A)(ii). The Seventh Circuit, the only Circuit outside of our own to interpret the amended statute, has explained:

> One could argue that § 1640(a)(2)(A)(i) and (ii) are separate "subparagraphs," and that "liability under this subparagraph" means only liability under § 1640(a)(2)(A)(ii). Although that reading has a certain appeal . . . *the history of this part of the statute suggests that such a reading has its own problems*. Until 1995, § 1640(a)(2)(A) had only two subsections, the present (i) and (ii). *Courts uniformly interpreted the final clause, which established the $100 minimum and the $1,000 maximum, as applying to both (A)(i) and (A)(ii).*

Strange, 129 F.3d at 947 (emphasis added).[2]

Disregarding the Seventh Circuit's well-reasoned analysis, the majority elects to create a circuit split, reasoning that the addition of (2)(A)(iii) has changed the meaning of the word

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the logic of that prior interpretation still applies . . . ." *Ante*, at 127.

[2] Similarly, one scholar has observed:

> [Congress] added the real estate limitation without changing the word "subparagraph." That lapse should not lead to a restriction of liability solely as to part (ii) because that would be a significant change that would require the word "subparagraph" to be applied only to part (ii), when that has always been applied to everything included in subparagraph (A).

Elwin Griffith, *Searching for Truth in Lending: Identifying Some Problems in the Truth in Lending Act and Regulation Z*, 52 Baylor L. Rev. 265, 305 (2000). As a result, Professor Griffith concluded, "Congress did not change its mind about the meaning of that word, but instead neglected to make the necessary adjustment when it added a third part to accommodate transactions secured by real estate." *Id.*

"subparagraph" in (2)(A)(ii). Finding that a new reading of "subparagraph" is necessary, the majority states, "The inclusion of the new maximum and minimum in (iii) shows that the clause previously interpreted to apply to all of (A), can no longer apply to (A), but must now apply solely to (ii), so as not to render meaningless the maximum and minimum articulated in (iii)." *Ante*, at 126 - 127.

If the $1,000 cap was intended to apply only to (ii), however, then the inclusion of the phrase "under this subparagraph" would be superfluous; the meaning of (ii) would be unchanged by its deletion. It is, of course, a well-recognized rule of statutory construction that courts should "avoid a reading [of a statute] which renders some words altogether redundant." *Lane v. United States*, 286 F.3d 723, 731 (4th Cir. 2002) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995)). Therefore, a reading of § 1640 making the phrase "under this subparagraph" meaningless should be disfavored.

Even more, to limit the $1,000 cap only to (2)(A)(ii) would create an inconsistency within the statute. The $2,000 cap in (2)(A)(iii) applies only to that individual clause, even though there is no phrase limiting its effect to one "subparagraph." If Congress also intended to limit the reach of the statutory cap in (ii), then it would have either deleted the words, "under this subparagraph" from (ii), or included the phrase in both (ii) and (iii). By declaring that the statutory cap in (ii) should apply to claims "under this subparagraph," but not similarly qualifying the cap in (iii), Congress must have meant the statutory caps in those two clauses to have different applications.

This reading is made even more compelling when one considers that the phrase "under this subparagraph" in § 1640(a)(2)(B) indisputably applies to all of subparagraph (B). Similarly, the statutory cap following (2)(A)(ii) applies to all claims under subparagraph (A), with the exception of claims under (2)(A)(iii), which contains its own, discrete limit. In

short, the most logical interpretation of the statute is to read the phrase "under this subparagraph" as applying generally to an entire subparagraph, either (A) or (B), and to read (2)(A)(iii) as creating a specific carve-out from that general rule for real-estate transactions.

This is the reading that has been adopted by the Seventh Circuit:

> [T]he 1995 amendment was designed simply to establish a more generous minimum and maximum for certain secured transactions, without changing the general rule on minimum and maximum damage awards for the other two parts of § 1640(a)(2)(A). We therefore conclude that the "subparagraph" mentioned in § 1640(a)(2)(A)(ii) continues to encompass what is now codified as subparts (A)(i) and (A)(ii), and not just subpart (A)(ii).

Strange, 129 F.3d 943, 947 (7th Cir. 1997). When Congress added § 1640(a)(2)(A)(iii), it included a $2,000 cap specifically for (iii), but left the older $1,000 cap unchanged. The qualifier, "under this subparagraph," remained. Thus, I would hold that the addition of (2)(A)(iii) did not alter the meaning of (2)(A)(i) or (2)(A)(ii). To hold otherwise would be to dramatically increase creditors' liability exposure under § 1640(a)(2)(A), without any explicit, statutory language to support such an increase.

III.

In sum, I concur with the majority's assessment that Koons engaged in a variety of scurrilous business practices that support the jury's finding of liability under both TILA and the VCPA. However, for the reasons articulated above, I believe that Koons' statutory liability for its TILA violation is capped at $1,000. Accordingly, I dissent in part from the majority's judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BRADLEY NIGH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 00-1634-A
KOONS BUICK PONTIAC	)	
GMC, INC. and	)	
HOUSEHOLD	)	
AUTOMOTIVE FINANCE	)	
CORPORATION,	)	
	)	
Defendants.	)	

SUPPLEMENTED AND FINAL JUDGMENT

THIS MATTER is before the Court on Defendant Koons Buick Pontiac GMC, Inc.'s ("Koons") Motion to Enter Final Judgment. The issue before the Court is whether Koons is entitled to the $30,000 in installments payments specified in the sales contract for the Truck that Plaintiff Bradley Nigh purchased. The Court holds that Koons is not entitled to the $30,000 in installment payments. Koons cannot assert its entitlement to the installment payments at this stage in the litigation because Koons' pleadings did not put Nigh or the Court on notice that Koons sought this amount in damages. Regardless, Koons is not entitled to the payments under Virginia law because Koons could not sue on the sales contract since Koons divested itself of all legal rights and title to the Truck and the credit contract when it assigned the Truck's credit contract to Defendant Household Automotive Finance Corporation. For these reasons, the Court

supplements its judgment and enters final judgment as set forth below.

I. BRIEF BACKGROUND

Defendant Koons filed a motion for summary judgment in this case on March 29, 2001. Koons moved for summary judgment on Counts II through V of its Counterclaims. The Court granted in part Koons' motion for summary judgment on April 20, 2001. The Court granted judgment for Koons on Koons' claim for damages in the amount Koons paid exceeding Plaintiff Nigh's estimate of the lien on Nigh's trade-in, and on the amount Koons had to pay to retrieve the trade-in, totaling $1,959.73. The Court also granted judgment for Koons on Koons' breach of contract claim asserting that Nigh failed to make installment payments for the purchase of the Truck and failed to pay off the additional $2,000 down payment owed on the promissory note.

Koons asserts in error that it is entitled to a judgment that includes $30,000 for the installment payments specified on the sales contract that Nigh signed. Koons' error stems from a lack of clarity in the Court's April 20, 2001 Opinion. The Court clarifies that holding at this time.

In holding that Nigh breached his contract by failing to make installment payments, the Court did not hold that Nigh was liable to Koons for the full amount of the total installments specified on the contract regardless of whether Koons had been paid full consideration for the contract. In ruling on Koons' motion for summary judgment, the Court recognized Count III of Koons' counterclaim as a breach of contract claim and simply held that Nigh did, in fact, breach his contract in two respects: (1) he failed to pay back the $2,000 promissory note, comprising the additional down payment amount, and (2) he failed to make installment payments. In granting summary judgment for Koons, the Court held that Koons was entitled to the damages that Koons sustained as a result of Nigh's breach of contract. The Court

did not conceive of the possibility that Koons sought a double recovery from the simple statement of damages that "Koons demands damages for breach of contract plus interest." (Answer and Counterclaims ¶ 26.) Koons is not entitled to recover under the sales contract twice.

The Court's holding in its April 20, 2001 Opinion was limited to a finding that Nigh was bound by the contract and, therefore, breached the contract in failing to make installment payments. Koons sold the value of the contract to another party, thereby making Nigh liable for the value of the Truck to the party who purchased the sales contract for value, not to Koons. (Pl. Statement of Material Facts not in Dispute, Ex. D[1]: Contract Registration (indicating that HAFC was the lien holder for the Truck).) Moreover, Nigh is liable only to the extent of the value of the sales contract that exceeds the value the purchaser of the sales contract received for the Truck. Thus, because Koons sold Nigh's finance agreement to Household Automotive Finance Corporation ("HAFC"), HAFC holds Nigh's contract. (*Id.*) Because HAFC then sold the Truck for value, but received less than the total that Nigh owed on the credit contract, HAFC could recover only an amount in installment payments that exceeded what HAFC received when it sold the Truck. (Pl. Statement of Material Facts, Ex. P: Notice of Deficiency (indicating that HAFC sold the Truck for $12,300 and demanded from Nigh $6,534.96 for the deficiency on the credit contract).) Moreover, HAFC's recovery is dependent on HAFC's filing for a claim for such amount.

II. PARTIES' CONTENTIONS

Koons argues that it is entitled to the full $30,000 in installment payments that Nigh would have paid over the life of the sales contract. (Pl. Statement of Material Facts, Ex. H:

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[1] This citation references Plaintiff's second exhibit labeled as "Exhibit D" for this pleading.

Sale Invoice (indicating that, after paying the $6,000 down payment, purchaser Nigh would make 60 payments over five years, totaling $30,000).) This argument is based on Koons' tardy, post-trial assertion that Koons counter-sued Nigh in its role as the assignor of the sales contract. Koons argues that either an assignor of a contract or the assignee can sue for payment on a delinquent contract. *See Carozza v. Boxley*, 203 F. 673, 677 (4th Cir. 1913). Koons further argues that it has a right to sue on the contract that it assigned to Defendant HAFC because Koons is potentially liable to HAFC for Nigh's failure to pay HAFC. *See* VA. CODE ANN. § 8.01-13 (Michie 2000) (stating that an assignee can recover against any assignor of a writing); § 8.01-281 (stating that a claimant can bring a claim based on future potential liability); *Jones v. Hyatt*, 38 Va. Cir. 140 (1995) (holding that the plaintiff could bring a claim for future potential liability, which might include future payments he was required to make because of his lawyer's malpractice).

In opposition, Nigh argues that the Court should not permit Koons to assert at this late date that Koons brought its counterclaims in the assignor role because Koons did not plead as much. *See* FED. R. CIV. P. 8(a) (stating that a claimant must state its claim to alert the defendant of the claimant's asserted bases for relief). Nigh further argues that Koons cannot sue on the contract that Koons assigned to HAFC because Koons was required to plead a set-off regarding the value for which Koons sold the Truck. *See* FED. R. CIV. P. 8(c). Also, Nigh argues that Koons cannot sue on the contract because Koons no longer holds the contract; HAFC holds it. Nigh notes that HAFC was a party to this action and never sought to enforce the right to payments on the contract. Nigh asserts that Koons cannot seek now to enforce that right.

III. DISCUSSION AND HOLDINGS

The Court holds that Koons cannot assert at this stage in the litigation that it sued on the sales contract as the assignor of the contract. Rule 8 of the Federal Rules of Civil Procedure requires a statement of a claim sufficient to put the opposing party on notice of the basis of the claimant's claim. *See Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995); *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (stating that all that is necessary is a plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests). Koons' pleadings put neither the Court nor Nigh on notice that Koons sought the entire value of the installment payments. Koons plead in Count 3 of its Counterclaim that it sued Nigh for breach of contract. (Answer and Counterclaims ¶¶ 25-26.) Koons sued Nigh for breach of the Buyer's Order agreement dated February 25, 2000. The Buyer's Order incorporated the third Retail Installment Sales Contract by referring to the terms of "future agreements." However, nowhere in Koons' Counterclaims—or any successive pleading, such as Koons' motion for summary judgment—did Koons assert that it sued on the contract in its role as assignor of the contract. In light of the parties' disclosures that Koons assigned the sales contract to HAFC, and that HAFC paid Koons value for the Truck, there was no notice that Koons meant to sue for the full value of the Truck. Therefore, Koons did not meet the notice pleading standard of Rule 8, liberal though that standard is. Neither Nigh nor the Court was on notice of Koons' asserted legal and factual basis of Koons' claims, and, therefore, the Court's April 20, 2001 holding did not confer judgment upon Koons for the $30,000.

The Court further holds that even if Koons had pled properly that it sought to sue as the assignor of the sales contract, Koons could not prevail on the full value of the contract on that basis. Koons may not sue for the $30,000 value of the sales contract because it assigned all of its rights

to payment on the contract to HAFC. *See Rodriguez v. Compass Shipping Co.*, 617 F.2d 955, 960-61 (2d Cir. 1980) (involving statutory assignment), *affirmed*, 451 U.S. 596 (1980); *Burns v. Cities Svc. Co.*, 217 S.E.2d 56, 58 (W. Va. 1975) (noting that all jurisdictions have held that the unconditional assignee, and not the assignor, is the real party in interest who must bring the action); CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1545, at 351 (West 1990) ("When all rights to a claim have been assigned, courts generally have held that the assignor no longer may sue.") Among the documents that demonstrate that Koons assigned all of its rights to title and payments to HAFC is the Notice of Deficiency that HAFC sent to Nigh on August 15, 2000 and the Department of Motor Vehicle's Certificate of Title for the Truck. (Pl. Statement of Material Facts, Ex. P: Notice of Deficiency; Def. Opp'n to Pl. Mot. for Summ. J., Ex. 3: DMV Certificate of Title.) The Certificate of Title lists Nigh as the owner of the Truck and HAFC as the lien holder; Koons is not recognized anywhere on the Certificate. The Notice of Deficiency demonstrates that HAFC obtained by assignment full legal title of the Truck and full rights to payment thereon because the Notice indicates that (1) after the assignment, Nigh's contract was with HAFC; (2) HAFC repossessed the Truck from the Koons lot[2]; (3) HAFC sold the Truck for value; and (4) HAFC claimed a deficiency from Nigh based on Nigh's failure to pay on the credit contract. The acts undertaken by HAFC demonstrate that HAFC holds the right to sue on the sales and credit contracts. Under Rule 17(a) of the Federal Rules of Civil Procedure, an action must be brought in the name of the party who possesses the substantive right being asserted under the

[2] Nigh declared that he left the Truck on the Koons lot. (Pl. Statement of Material Facts, Ex. O: Declaration of Bradley Nigh ¶ 6.) The fact that HAFC repossessed the Truck although it was in Koons' possession, and no longer with Nigh, indicates that, after the assignment, Koons no longer had even the right to possess the Truck.

applicable law. FED. R. CIV. P. 17(a); *see also Virginia Elec. & Power Co. v. Westinghouse Elec. Corp.*, 485 F.2d 78, 83 (4th Cir. 1973) (stating that the reason behind Rule 17 is that an action be brought by a person who possesses the right to enforce a claim and who has a significant interest in the litigation); *Doherty v. Mutual Warehouse Co.*, 245 F.2d 609 (5th Cir. 1957); *Kenrich Corp. to Use of Kline v. Miller*, 256 F. Supp. 15 (D.C. Pa. 1966), *affirmed on other grounds*, 377 F.2d 312 (3d Cir. 1967). Suit by the real party in interest enables the defendant to present its defenses and ensures that the judgment will have proper res judicata effect. *See Virginia Elec. & Power Co.*, 485 F.2d at 84 (citing Rule 17). In this case HAFC, not Koons, was the real party in interest on a claim for the installment payments. Suit by Koons alone would have subjected Nigh to future litigation by HAFC, the party that held the credit contract. Thus, Koons could not sue for the installment payments because it assigned the right to demand payment on the contract to HAFC. *See Vance v. Maytag Sales Corp.*, 165 S.E. 393, 396 (Va. 1932) (indicating that the action had to be brought by the assignee, who was the real party in interest, and, therefore, the assignor could not sue).

Koons' dependence on *Carozza v. Boxley* for Koons' position that Koons can sue to enforce installment payments on the sales contract is misplaced. Koons cites *Carozza* for the proposition that an assignor retains a right to sue after the assignment has been made. *See* 203 F. at 676-77. The *Carozza* court did so hold, but under different circumstances. The *Carozza* court held that the assignor could still sue on the contract even after assignment because, in *Carozza*, all legal title remained in the assignor after the assignment. *See id.* at 676. In *Carozza*, a subcontractor contracted with a contractor to perform construction work for payment. The subcontractor then assigned to its creditors the right to be paid from the contractor. The *Carozza* court noted that the assignment in *Carozza* was only a partial assignment, meant to pay the

subcontractor-assignor's creditors. *See id.* at 677. After the creditors were paid in full, the assignor retained legal title to payments on the original construction contract. Therefore, the creditors-assignees obtained only equitable rights to payment, while the assignor retained legal rights and title in the contract. *See id.; see also Bentley v. Standard Fire Ins. Co.*, 23 S.E. 584, 585 (Va. 1895) (stating that a first assignor could not sue in his own name because he passed legal title to his assignee, but that a second assignor could still bring suit in his own name because the second assignor passed only equitable title and retained legal title). *Carozza* is not controlling here because Koons' situation differs from the assignor in *Carozza*.

Koons may not sue to enforce Nigh's obligation under the contract because Koons transferred fully its rights under the sales contract. An assignor, to the extent it has divested itself of ownership or title, loses all right to enforce a claim on an assigned contract. *See Sweeney v. Foster*, 71 S.E. 548, 549-50 (Va. 1911); *Vance*, 165 S.E. at 396; *Contemporary Mission, Inc. v. Famous Music Corp.*, 557 F.2d 918, 924 (2d Cir. 1977); *C.C. James Roofing Co. v. Regent Theater Co. of Grand Rapids*, 211 N.W. 85, 85-86 (Mich. 1926). *Cf. Continuous Zinc Furnace Co. v. American Smelting & Refining Co.*, 61 F.2d 958, 959 (2d Cir. 1932) (assignor could maintain cause of action separate from that of assignee because assignor made only a partial assignment). HAFC held full legal title for payments from Nigh. Thus, Koons could not sue on rights assigned to HAFC.

Moreover, assignee HAFC was not a mere collection agent for Koons. Koons has informed the Court that HAFC paid Koons in full for the value of the Truck; so HAFC would have legal title in the money HAFC collected from Nigh. Thus, Koons' assignment to HAFC was not a partial assignment or an assignment for collection, whereby the assignment would have left beneficial ownership of the contract, and payments thereon, with Koons. *See, e.g., Rouse v. Archer*, 131 A. 753 (Md. 1926) (stating that partial assignee of a mortgage held

the mortgage in trust for the assignor); *Hipp v. Spencer*, 109 P. 1109, 1109-10 (Colo. 1910) (holding that assignee for collection was entitled to only a small share of the fee collected for satisfaction of a debt, and assignor was entitled to the balance); *McFadden v. Swinerton*, 59 P. 816, 820-21 (Or. 1900) (involving an assignment of claims for collection where the assignors retained the right to receive the majority balance on the recovery). Therefore, Koons could not maintain an action for full payment on the installment payments because it made an absolute assignment of the payments to HAFC. *See, e.g., Sweeney*, 71 S.E. at 550; *Burns*, 217 S.E.2d at 58-60 (applying the same "real party in interest" rule to the assignment context as Virginia); *Young v. Willing*, 2 U.S. 276, 277, 1 L.Ed. 380, 380 (Pa. 1797).

Furthermore, Koons did not effectively sue for the full $30,000 value *on behalf of* HAFC. If Koons sought in its counterclaims to assert on behalf of HAFC the rights that HAFC had under the assigned contract, then HAFC was an indispensable party to the counterclaims. *See Sweeney*, 71 S.E. at 550-51; *Hurt v. Miller*, 27 S.E. 831, 832-33 (Va. 1897). As such, Koons was required to join HAFC to the counterclaims suit under Rule 19. *See* FED. R. CIV. P. 19. HAFC was not a party to the counterclaims, so Koons did not countersue on HAFC's behalf.

Koons argues as an alternative to its argument that it could sue in its own right for the $30,000, as assignor of the sales contract, that it was entitled to sue for the $30,000 under Virginia Code § 8.01-281 because of Koons' potential liability to HAFC. Koons asserts that it is potentially liable to HAFC for $30,000 because Nigh defaulted on his payment contract with HAFC. Koons' argument fails for two reasons: (1) Virginia courts have not interpreted § 8.01-281 to permit an individual to sue a party on the off-chance that the individual may be sued by a third-party, especially where the third-party has not filed a claim against the individual; and (2) it is unlikely that Koons would be liable to HAFC for

$30,000 because HAFC recouped some of the value of the credit contract by re-selling the Truck.

Koons could not sue for the $30,000 on the basis that HAFC might bring a claim against Koons for that amount. Koons relies on Virginia Code § 8.01-281, which provides that a party asserting a claim can plead alternative facts and theories of recovery against alternative parties, provided that the joined claims arise out of the same transaction or occurrence. The section further provides that the claim may be for contribution, indemnity, subrogation, or contract, express or implied, and that "it may be based on future liability." VA. CODE ANN. § 8.01-281(A). Finally, the section states that it shall be no defense to the claim based on the future liability that the claimant "has made no payment or otherwise discharged any claim as to him arising out of the transaction or occurrence." *Id.* Virginia courts have made clear that this section is a procedural device for the sake of judicial economy. *See Gemco-Ware, Inc. v. Rongene Mold & Plastics Corp.*, 360 S.E.2d 342, 344 (Va. 1987) (stating that *Wingo v. Norfolk & W. Ry.* properly interprets the statute and Virginia law); *In re FELA Asbestos Litigation, Wingo v. Norfolk & W. Ry.*, 638 F. Supp. 107, 114 (W.D. Va. 1986), *reversed on other grounds*, 834 F.2d 375 (4th Cir. 1987) (hereinafter "*Wingo*"); *Pilkington v. NVC of Vienna*, 1999 WL 1499537, *3 (Va. Cir. Ct. 1999). Usually, a claim for indemnity or contribution does not accrue until the time of the indemnitee's/contributee's injury, *see Gemco-Ware*, 360 S.E.2d at 344; *Wingo*, 638 F. Supp. at 114; the injury accrues when the indemnitee/contributee seeking relief has paid more than its share of an obligation, *see Virginia Int'l Terms, Inc. v. Ceres Marine Terms, Inc.*, 879 F. Supp. 31, 32 (E.D. Va. 1995). Absent § 8.01-281, a defendant who need not bear the full burden of liability for a plaintiff's claim would not be able to file a cross-claim or a third-party claim for indemnity, but would have to wait until it had paid on the judgment before it could bring a claim for indemnity or

contribution. Section 8.01-281 is meant to permit a party having a claim for indemnity or contribution to bring its claim within a pending lawsuit, before the indemnity or contribution claim has accrued. *See Virginia Int'l Terms, Inc.*, 879 F. Supp. at 32. The statute anticipates that a party bringing a claim based on potential liability has actually had a claim filed against it. *See* VA. CODE § 8.01-281 (indicating that a party may bring a claim based on potential liability even though the party has not yet discharged the liability on *the claim filed against it*). Koons' claim against Nigh does not fit into this context. This is not a situation in which HAFC brought a claim against Koons and Koons, in turn, sued Nigh for contribution or indemnity within the pending lawsuit. Instead, Koons asserts that it sued Nigh on the unfulfilled possibility that HAFC would sue Koons. Virginia law does not generally permit claimant's to bring claims for damages where no damages have been sustained. In this case, Koons could not sue Nigh for damages via Koons' counterclaims where HAFC had not even filed a claim against Koons from which damages could flow. Therefore, Koons' argument that it is entitled under § 8.01-281 to $30,000 for "potential liability" fails.

Koons' reliance on *Jones v. Hyatt* for the proposition that Koons can recover for possible future liability is misplaced. *See* 38 Va. Cir. 140 (1995). Cases from Courts higher than *Jones* have held that § 8.01-281's potential liability clause is merely a means to promote judicial economy and does not alter the settled rules on the accrual of a cause of action. *See Gemco-Ware*, 234 Va. at 344; *Wingo*, 638 F. Supp. at 113; *Pilkington*, 1999 WL 1499537 at 3. The Fourth Circuit has noted its belief that Virginia's highest court would reject *Jones v. Hyatt*. *See McCoubrey v. Kellogg, Krebs & Moran*, 246 F.3d 666, 2001 WL 326709, *4-5 (4th Cir. 2001) (unpublished opinion interpreting *Jones v. Hyatt, Gemco-Ware, Pilkington, Wingo*, and § 8.01-281). Therefore, this Court does not defer to the circuit court's ruling in *Jones* regarding potential liability claims.

Another *Jones v. Hyatt* case demonstrates that Koons' claim for potential damages cannot lie. *See* 681 So. 2d 381 (hereinafter "*Jones II*"). In *Jones II*, the Fourth Circuit permitted a prevailing plaintiff to recover for future medical expenses. However, in that case, the court awarded expenses as damages on an existing claim for an injury already sustained. The *Jones II* court did not permit a claimant to recover for a future claim or recover damages that had not yet been sustained. In fact, the *Jones II* court explicitly held that the plaintiff could *not* recover a damages award based on the mere "possibility" that the plaintiff would incur future expenses. *See Jones II*, 681 So. 2d at 389, 393 (holding that an award for future medical expenses had to be supported by medical testimony and an estimation of probable costs, and that testimony that it was a "possibility only" that the plaintiff would need future surgery was insufficient to award costs for a future surgery). Koons bases its claim to the installment payments on the "possibility only" that Koons will be liable to HAFC for Nigh's default. Koons' potential for liability is not supported by any evidence. There is no indication that HAFC had filed any claim against Koons at the time Koons pressed its countersuit. Therefore, Koons' assertion that it is entitled to the value of the installment payments for Koons' potential future liability is unpersuasive.

Koons' argument that it has "possibility only" in the amount of $30,000 also fails because HAFC would have only been able to sue Koons for the value of the Truck sales contract that HAFC was unable to recoup from the sale of the Truck. Under Virginia Commercial Code § 8.9-504, HAFC could sell, lease, or otherwise dispose of the Truck and use the proceeds to satisfy Nigh's indebtedness. *See* VA. CODE ANN. § 8.9-504(1) (Michie 1991)[3]; *see also Garcia Enters., Inc. v. Enterprise Ford Tractor, Inc.*, 480 S.E.2d 497, 500

[3] Section 8.9-504 was repealed effective July 1, 2001, but this was the applicable Code section at all times relevant to this suit.

(Va. 1997) (stating that a secured creditor can take possession of and sell secured property when a default occurs). At the hearing on Koons' motion for final judgment, Koons reported that HAFC repossessed the truck from the Koons lot and then sold it. This is supported by the Notice of Deficiency. (Pl. Statement of Material Facts in Dispute, Ex. P.) HAFC sold the Truck for $12,3000, but did not receive the full value of the Truck credit contract. The sale left a deficiency of $6,534.96, consisting of the balance on the credit contract, accrued interest, repossession and legal fees, and sales expenses. (*Id.*) Therefore, the amount of Koons' "future potential liability" is not the $30,000 Koons now seeks, but more closely approximates $6,500; and Koons' liability for even this amount is not automatic.

After HAFC's disposal of the Truck to satisfy Nigh's debt, Nigh is liable for the remaining deficiency. *See* VA. CODE ANN. § 8.9-504(2). If HAFC attempts with due diligence to recover the deficiency from Nigh but is still unable to do so, only then can HAFC resort to suit against Koons. *See Daniel v. Yearick*, 46 S.E.2d 333, 404-05 (Va. 1948); *Payne v. Huffman*, 36 S.E. 476, 477 (Va. 1900). Except in special circumstances,[4] suit against the obligor is generally necessary to show an assignee's diligence. *See, e.g., Caton v. Lenox*, 26 Va. 31, 1827 WL 1192, *1 (1827). *But see Mackie v. Davis*, 2 Va. 219, 1796 WL 617, 5, 6, 8-9 (1796) (holding that the assignee had exercised due diligence by making demand upon

[4] Examples of special circumstances where suit is not necessary are (1) the document making the assignment was a forgery and the assignor has received the money from the assignee; (2) the assignor practiced a fraud upon the assignee; (3) exchange notes were given between an obligor and an assignor, as a consideration for each other, and the assignor has not ever paid on the note the assignor gave, nor has the assignor's note been sued upon, etc. *See Caton*, 26 Va. 31, 1827 WL 1192 at 1. Another circumstance which would excuse an assignee from first bringing suit against an obligor is the obligor's insolvency, and the assignee's knowledge of that insolvency. *See Payne*, 36 S.E. at 477.

the obligor for payment, without bringing suit against the obligor). At the time that Koons brought its countersuit against Nigh, Koons presented no argument or evidence to the Court that HAFC had sued Nigh for defaulting on the assigned contract. Consequently, there has been no indication that HAFC was or is in a posture to sue Koons. Therefore, Koons' argument that Koons, as assignor to HAFC, will be liable to HAFC for Nigh's default is unavailing. Notwithstanding, the amount of Koons' liability would approximate only $6,534.96. Thus, the Court finds Koons' post-trial claim for the $30,000 for Koons' "potential liability" to be without merit.

IV. FINAL JUDGMENT

For the reasons stated above, the Court holds that Koons is not entitled to judgment in the amount of $30,000 for its breach of contract counterclaim. Therefore, the Court renders the following final judgment. This judgment incorporates the April 21, 2001 judgment on Defendant Koons' motion for summary judgment, the May 1, 2001 judgment on Plaintiff Nigh's motion for summary judgment, and recognizes the May 3, 2001 Judgment rendered by the Clerk after the jury verdict in this case. Accordingly, it is hereby

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count I of the Complaint, *except* on the claim asserting that Defendant Koons violated the technical aspects of the Federal Odometer Act with the intent to defraud the Virginia Department of Motor Vehicles;

ORDERED that the Court, pursuant to the Jury's verdict, ENTERS JUDGMENT in favor of the Defendant Koons, and against Plaintiff Nigh, on the remaining claim in Count I of the Complaint, finding that Koons did not violate the Federal Odometer Act by committing technical violations with the intent to defraud the Virginia Department of Motor Vehicles;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count II of the Complaint;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count III of the Complaint, *except* on the claim asserting that Koons violated the Truth in Lending Act by charging Nigh for a silencer on the February 25, 2000 Retail Installment Sales Contract;

ORDERED that the Court, pursuant to the Jury's verdict, ENTERS JUDGMENT in favor of Plaintiff Nigh, and against Defendant Koons, on Count III of the Complaint, finding that Koons violated the Truth in Lending Act by charging Nigh for a silencer on the February 25, 2000 sales contract;

ORDERED that JUDGMENT IS ENTERED in favor of Plaintiff Nigh, and against Defendant Koons, in the amount of $24,192.80 for Koons' violation of the Truth in Lending Act;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count IV of the Complaint;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Count V of the Complaint, *except* on the claim asserting that Koons violated the Virginia Consumer Protection Act by representing to Nigh that Koons considered the vehicle that it sold to Nigh stolen absent Nigh's signature on the March 5, 2000 sales contract;

ORDERED that the Court, pursuant to the Jury's verdict, ENTERS JUDGMENT in favor of Plaintiff Nigh, and against Defendant Koons, on Count V of the Complaint, finding that Koons violated the Virginia Consumer Protection Act by misrepresenting to Nigh that Nigh's possession of the vehicle was illegitimate if Nigh did not return to the dealership to sign a new sales contract;

ORDERED that JUDGMENT IS ENTERED in favor of Plaintiff Nigh, and against Defendant Koons, in the amount of $4,000.00 for Koons' violation of the Virginia Consumer Protection Act;

ORDERED that the Court, pursuant to the Jury's verdict, ENTERS JUDGMENT in favor of Defendant Household Automotive Finance Corporation, and against Plaintiff Nigh, on Count V of the Complaint, finding that Household Automotive Finance Corporation was not liable under the FTC Holder Rule for Koons' violation of the Virginia Consumer Protection Act;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on every aspect of Counts VI, VII, VIII, IX, X, XI, and XII of the Complaint;

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Household Automotive Finance Corporation ("HAFC"), and against Plaintiff Nigh, on Counts I, VI, VII, VIII, IX, X, XI, and XII of the Complaint (HAFC can not be liable under the FTC Holder Rule where Koons is not liable);

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant HAFC, and against Plaintiff Nigh, on Count XIII because HAFC can not be liable for breach of contract under the FTC Holder Rule where Koons is not liable for breach of contract (the Court has found in favor of Koons for the breach of contract claim alleged against Koons in Count IX);

ORDERED that the Court ENTERS JUDGMENT in favor of Defendant Koons, and against Plaintiff Nigh, on Counts I, II and III of Koons' Counterclaim. Therefore, it is hereby

ORDERED that JUDGMENT IS ENTERED in favor of Defendant Koons, and against Plaintiff Nigh, in the amount of $2,000 plus interest under Counterclaim Count I for Nigh's failure to pay on the February 25, 2000 promissory note;

ORDERED that JUDGMENT IS ENTERED in favor of Defendant Koons, and against Plaintiff Nigh, in the amount of $1,959.73 plus interest under Counterclaim Count II for Nigh's breach of his agreement to pay the excess over his trade-in vehicle;

ORDERED that Koons is not entitled to any additional award for prevailing on its breach of contract claim in Count III because the $2,000 awarded on the promissory note satisfies the balance owed to Koons on the sales contract, which comprised the difference between the $6,000 down payment Nigh promised to pay by contract and the $4,000 down payment Nigh actually paid (as detailed above, Koons is *not* entitled to the installment payments on the contract, the value of which Koons assigned to Defendant HAFC). It is further

ORDERED that Koons' Counterclaim Counts IV and V are DISMISSED WITH PREJUDICE as being without merit.

Finally, upon calculation of the preceding, it is hereby

ORDERED that DAMAGES ARE AWARDED for Plaintiff Bradley Nigh, and against Defendant Koons Buick Pontiac GMC, Inc., in the total amount of $28,192.80 plus interest;

ORDERED that DAMAGES ARE AWARDED for Defendant Koons Buick Pontiac GMC, Inc., and against Plaintiff Bradley Nigh, in the total amount of 3,959.73 plus interest. Interest upon $2,000 of the principal shall be calculated at a rate of 18% from March 23, 2000, as prescribed by contract.

The Clerk is directed to forward a copy of this Supplemented and Final Judgment to counsel of record.

Entered this 15th day of August, 2001.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
08/15/01

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Bradley Nigh,	)
	)
Plaintiff,	)
	) Civil Action
	) No. 00-1634-A
Koons, Buick, Pontiac, GMC, Inc. et al,	)
	)
	)
Defendants.	)
	)

MEMORANDUM ORDER

THIS MATTER is before the Court on Plaintiff's Motion for Attorneys' Fees and Costs.

The issue before the Court is whether Plaintiff has demonstrated that he is entitled to the requested attorneys' fees and court costs under the Virginia Consumer Protection Act or the Truth in Lending Act. The Court holds that Plaintiff is entitled to attorneys' fees and court costs under both statutes. Plaintiff won claims under both the Virginia Consumer Protection Act and under the Truth in Lending Act. The Virginia Consumer Protection Act states, "in addition to any damages awarded, such persons also may be awarded reasonable attorney's fees and court costs." VA. CODE ANN. § 59.1-204 (Michie 2000). The Truth in Lending Act states, "in the case of any successful action to enforce the foregoing liability . . . [the plaintiff should be awarded] the cost of the action, together with a reasonable attorney's fee as determined by the court." 15 U.S.C. § 1640(3). Thus, applying Federal Rule of Civil Procedure 54(d), the four factors used in *Superior Form Builders v. Dan Chase Taxidermy Supply Co.*, 881 F. Supp. 1021, 1024 (E.D. Va. 1994), and the twelve

"Johnson factors", adopted by this jurisdiction in *Barber v. Kimbrell's Inc.*, 577 F.2d 216, 226 (4th Cir. 1978) (citing *Johnson v. Georgia Highway Express, Inc.*, F.2d 714, 717-19 (5th Cir. 1974) and applied in *Superior Form Builders*, the court awards Plaintiff attorneys' fees and costs. However, the Court reduces the amount of the requested award by forty percent to reflect the overall lack of success by the plaintiff in this lawsuit. Hereby, Plaintiff is awarded $26,129.10 in attorneys' fees and costs.

I. BACKGROUND

On October 3, 2000, Plaintiff Bradley Nigh ("Nigh") initiated the present action against Defendant Koons, Buick, Pontiac, GMC, Inc. ("Koons"), alleging conversion, breach of contract, fraud and violations of the Federal Odometer Act, the Truth in Lending Act, and the Virginia Consumer Protection Act. On May 3, 2001, the jury returned its verdict in the form of special interrogatories. The jury found that Koons violated the Truth in Lending Act with regard to the disclosure of the amount financed and that Koons willfully violated the Virginia Consumer Protection Act with regards to representations made to induce Nigh to sign the third retail installment sales contract. Nigh has made a motion to this Court for the award of attorneys' fees and court costs in the amount of $43,548.50 for attorneys' fees and costs expended on behalf of Nigh.

II. PARTIES' ARGUMENTS

Plaintiff Nigh argues that the Court should grant an award of attorneys' fees to Nigh because of the statutory provisions found in both the Truth in Lending Act and the Virginia Consumer Protection Act. Further, Nigh argues, based on exhibits provided, that the attorneys' fees sought are both reasonable and accurate.

In opposition, Defendant Koons argues that Nigh's motion should be stricken because Nigh made a blanket claim of privilege during discovery and did not provide discovery as to

his attorneys' fees. Koons asserts that, should the motion not be stricken, the Court should withhold setting a schedule to resolve the motion pending resolution on appeal of whether Koons is liable to Nigh under either the Truth in Lending Act or the Virginia Consumer Protection Act. Further, Koons contends that Nigh should not be awarded attorneys' fees because his request is unreasonable.

III. DISCUSSION

A. Koons' Supplemental Motion.

As an initial matter the Court grants Koons leave to file its Supplemental Opposition. However, the Court does not accept any of the arguments therein.

B. Compliance with Federal Rule of Civil Procedure 54(d)(2).

Nigh, in filing this motion, has fulfilled the requirements of Rule 54(d)(2). Rule 54(d)(2) governs the award of attorneys' fees and costs. Rule 54(d)(2) states that the plaintiff must make a motion for award of attorneys' fees and costs within 14 days of the entry of a final order, specify the statute entitling the plaintiff to attorneys' fees, and state the amount of legal fees sought. FED. R. CIV. P. 54(d)(2). Although Nigh filed this motion prior to the entry of the final order that would give him statutory authority to be awarded attorneys' fees, Nigh has complied with the 14-day statute of limitations in filing this motion. Nigh's claim is based upon the Virginia Consumer Protection Act and the Truth in Lending Act. Both statutes allow a plaintiff to be awarded attorneys' fees, and Nigh prevailed on claims under both acts.

C. Application of the Superior Form Builders Factors for Virginia Consumer Protection Act Award.

Although the award of attorneys' fees under the Virginia Consumer Protection Act is discretionary, because Nigh prevailed under the Virginia Consumer Protection Act, he

should be awarded attorneys' fees under this statute. *See* VA. CODE ANN. § 59.1-204.

In determining whether to award attorneys' fees under a discretionary statute, the Court should consider four factors in deciding whether to award attorneys' fees: (1) the motivation of the parties; (2) the objective reasonableness of the legal and factual positions advanced; (3) the need in particular circumstances to advance considerations of compensation and deterrence; and (4) any other relevant factors presented. *See Superior Form Builders*, 881 F. Supp. at 1024. Although the Fourth Circuit has adopted this four-prong test in order to decide whether to award attorneys' fees under section 505 of the Copyright Act[1], this Court used the test as a guide in determining whether Nigh should be awarded attorneys' fees under the Virginia Consumer Protection Act because the award of attorneys' fees under both Acts is discretionary.

First, the Court considers the motivation of the party from whom attorneys' fees are sought. *See Superior Form Builders*, 881 F. Supp. at 1024. In considering the motivation of the parties, the district court may consider whether the opposing party acted willfully or in bad faith. In *Superior Form Builders*, the jury found that the defendant had acted willfully in infringing the plaintiff's copyrights. This finding weighed heavily in favor of awarding attorneys' fees to the plaintiff. In this case, the jury found that Koons willfully violated the Virginia Consumer Protection Act with regards to representations made to induce Nigh to sign the third retail installment sales contract. Although not dispositive, the fact that Koons willfully violated the Virginia Consumer Protection Act, weighs heavily in favor of awarding attorneys' fees to Nigh.

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[1] Section 505 of the Copyright Act provides that "[i]n any civil action under this title, the court in its discretion may . . . award a reasonable attorney's fee to the prevailing party as part of the cost." 17 U.S.C. § 505.

The next factor the Court considers in deciding whether to award attorneys' fees is the objective reasonableness of the legal and factual positions advanced by the party opposing the award of attorneys' fees. This enables the Court to determine whether the positions advanced by the opposing party in the primary suit were frivolous or well grounded in law and fact. In *Superior Form Builders*, the court determined that although the defendant's positions were not frivolous, they were not well grounded in law. *See Superior Form Builders*, 881 F. Supp. at 1024. In this case, the Court holds that Koons' positions were not frivolous and were well grounded in law and fact because Koons prevailed on many of the original counts and claims. However, the jury did find that Koons willfully violated the Virginia Consumer Protection Act, and thus, this factor weights in favor of a fee award for Nigh.

Next, the Court evaluates the need to advance considerations of compensation and deterrence. In *Superior Form Builders*, the defendant had pending suits against him and his company in other jurisdictions for identical copyright infringement claims. Hence, the court determined that only a substantial award of damages as well as attorneys' fee would deter the defendant from continuing his wilful and outrageous conduct. In this case, the record does not reflect repeated willful violations of the Virginia Consumer Protection Act by Koons. Thus, the Court does not view deterrence as a justification for awarding attorneys' fees to Nigh.

Finally, in deciding whether to award attorneys' fees, the Court considers any other relevant factors to determine if an award of attorneys' fees should be given. In *Superior Form Builders*, the court determined that the defendant made the trial more difficult, and thus more costly, by making continued attempts during trial to confuse the jury with irrelevant and settled issues. In this case, Koons assisted the litigation by pursuing a motion for summary judgment in order to ferret out weak and meritless claims. The Court ultimately granted summary judgement on two/thirds of Koons' contentions.

However, the Court must still consider that a jury did find Koons liable for violating the Truth in Lending Act with regards to the disclosure of the amount financed. Thus, the jury verdict here holds Koons liable for attorneys' fees and costs under the Truth in Lending Act and the Virginia Consumer Protection Act.

D. Application of the 12 Johnson Factors.

When making a determination on a motion for an award of attorneys' fees, district courts must consider several factors in order to determine whether the amount of the attorneys' fees requested is reasonable. In order to make such a determination the Court considers the following twelve factors, also known as the "Johnson factors:" (1) the time and labor expended; (2) the novelty and difficulty of the question raised; (3) the skill required to properly perform the legal service rendered; (4) the attorneys' opportunity cost in presenting the instant litigation; (5) the customary fee for like work; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the result obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases. *See Barber*, 577 F.2d at 226; *Superior Form Builders*, 881 F. Supp at 1025. The Court must consider each of the 12 factors and its impact on the reasonable hourly rates or on the reasonable number of hours expended before granting an award of attorneys' fees. In addition to the 12 factors, the moving party must prove entitlement to an award, document hours expended, and document hourly rates. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (U.S. 1983).

1. Time and labor expended.

The Court holds that documents support a finding that the time and labor expended by Nigh's attorneys on this case were reasonable and necessary in order to accomplish the required tasks, and that no unnecessary work was performed in order to increase the legal fees. In *Superior Form Builders*, the moving party submitted affidavits from his own attorneys and from local attorneys verifying hours spent and customary charges. *See Superior Form Builders*, 881 F. Supp. at 1026. In addition, the court considered how the attorneys' experience in complex and specialized litigation reduced the total time and labor required for the case. Although Nigh did not provide information about attorneys' fees during discovery, Nigh has submitted affidavits supporting the amounts charged and a detailed record of tasks performed and hours spent. Although Koons argues that Nigh's attorneys spent excessive time on each task, Nigh contends that his attorneys actually waited just before trial to do most of the preparation work in order to keep legal fees down as low as possible. Therefore, the Court holds that Nigh's attorneys spent reasonable time and labor on this case, and that Nigh's attorneys produced sufficient evidence in support of such an award. Thus, the Court holds that this factor is favorable to awarding Nigh the requested amount for attorneys' fees.

2. The novelty and difficulty of the question raised.

The Court holds that the novelty and difficulty of the questions raised in this case were at least moderate. In *Superior Form Builders*, the court took into account that the issue before the court was one of first impression, involving new and complex questions of copyright law which required technical evidence. Although Koons suggests that the case could have been settled out of court or at summary judgment, Koons offers no specific argument regarding the novelty and difficulty of the questions raised. Nigh argues that the issues before the court were moderately novel and difficult. Nigh

submits that the law is in development and there are very few published jury instructions, and that the law is rapidly changing within the Virginia United States district courts. However, the Court holds that many of Nigh's claims were overblown and boilerplate blanket claims that ultimately had no merit. For example, Nigh claimed a violation of the Federal Odometer Act when it is clear that the odometer was working and was accurately described to Nigh when he took possession of the vehicle. Therefore, the Court, upon consideration of the legal issues presented during the motions, holds that this case presents moderately challenging litigation. Thus, the Court holds that this factor is marginally favorable to awarding Nigh the requested amount for attorneys' fees.

3. The skill required to properly perform the legal services rendered.

The Court holds that this area of law requires at least moderate skill in order to properly perform the legal services rendered. In *Superior Form Builders*, the court considered how the "case required lawyers with skills in both the substantive area of copyright law and in complex litigation." *Superior Form Builders*, 881 F. Supp. at 1026. In this case, Nigh contends that few lawyers practice or understand this area of law because the complexity in these cases emanates from the inter-relationship between various statutes and Virginia law governing automobile dealers. Koons does not contest this argument. Therefore, the Court holds that Nigh's attorneys required at least moderate skill in order to properly perform the legal services rendered. Thus, the Court holds this factor as favorable to awarding Nigh the requested amount for attorneys' fees.

4. The attorneys' opportunity cost in pressing the instant litigation.

The Court holds that Nigh's attorneys had to forego other employment in order to litigate this case. In *Superior Form Builders*, the court considered the number of cases placed on

the "back burner," the attorneys' potential lost earnings, and the time and duration spent on trying the case. In this case, Nigh's attorneys contend that they were unable to accept other matters and perform work for other clients while working on this case, particularly, during the month of April 2001. Further, Nigh argues that, as a general rule, attorneys receive a greater hourly rate for work performed on cases that settle than for ones that go to trial. Accordingly, trying a case like this one not only prevents acceptance of other matters, but leads to a lower hourly rate on lawyer time. Koons does not contest this argument. Therefore, the Court holds that Nigh's attorneys had to forego other employment to litigate this case. Thus, the court holds that this factor is favorable to awarding Nigh the requested amount for attorneys' fees.

5. The customary fee for like work.

The Court holds that Nigh's attorneys' hourly rates for all its employees are reasonable. In *Superior Form Builders*, the court looked at affidavits and the 1993 Report of Economic Survey to determine the reasonableness of the attorneys' fees. *See* 881 F. Supp. at 1026. In addition, the court used its own experience to determine that the rates were reasonable. In this case, Nigh's attorneys have submitted an affidavit supporting the reasonableness of the rates charged. Koons offers no evidence to rebut the reasonableness of these rates. Therefore, the Court holds that the hourly rates charged by Nigh's attorneys were reasonable. Thus, the Court holds this factor as favorable to awarding Nigh the requested amount for attorneys' fees.

6. Whether the fee is fixed or contingent.

This factor is later discussed in combination with factor 10, the "undesirability" of the case. *See infra* § III(d)(10).

7. The time limitations imposed by the client or circumstance.

The Court holds that no time limitations were imposed by the client or by the circumstances. Nigh does not contend, nor

does Koons contest, that there were any significant time limitations imposed by the client or the circumstances. Nigh's attorneys state that they had plenty of time to draft and file the Complaint under the applicable statutes of limitations. Therefore, the Court holds that no significant time limitations were imposed upon Nigh's attorneys. Thus, this factor neither favors nor disfavors the requested award of fees because the fees charged were neither increased nor decreased by time factors.

8. The attorneys' expectations at the outset of the litigation and the result obtained.

The Court holds that Nigh's counsel's expectations at the outset of the litigation were not reasonable. In this case, Koons contends that Nigh's fees are not related to the result obtained and that Nigh's attorneys needlessly increased the cost of litigation. Nigh filed a thirteen count Complaint with over forty claims alleging violations of the Federal Odometer Act, the Truth in Lending Act, the Virginia Consumer Protection Act, as well as breach of contract, fraud, and conversion. *Most of Nigh's claims were dismissed on Defendants' motions for summary judgment.* Out of all the counts and claims made in the Complaint, Nigh only prevailed on two claims. Therefore, the Court holds that Nigh obtained limited success in the lawsuit. In *Hensley v. Eckerhart*, the United States Supreme Court stated that the most critical of the twelve factors in evaluating the reasonableness of the amount requested for attorneys' fees is the degree of success. *See* 461 U.S. 424, 436 (1983). Thus, the Court holds that this factor is very unfavorable to awarding Nigh the requested amount for attorneys' fees.

9. The experience, reputation, and ability of the attorney.

The Court holds that Nigh's attorneys are competent to bring this type of lawsuit. In *Superior Form Builders*, the court looked at affidavits which supported the good reputation, ability, and the complex litigation experience of the attorneys

involved. *See* 881 F. Supp. at 1028. Although Nigh's attorneys do not have affidavits from the community regarding their reputation, Mr. Blankingship's affidavit does give evidence of his and the other attorneys' experience and ability. Koons does not refute the experience, reputation, or ability of Nigh's attorneys. Therefore, the Court holds that Nigh's attorneys are competent to litigate cases of this type. Thus, the Court holds this factor as favorable to awarding Nigh some amount of attorneys' fees.

10. The undesirability of the case within the legal community in which the suit arose.

The parties agree that consumer automobile litigation is neither the most desirable nor the most profitable area of law to practice. In *Superior Form Builders*, the court discussed *Johnson* Factors 6[2] and 10[3] together. *See* 881 F. Supp. at 1027. The court held that contingency arrangements favor awarding plaintiff's attorneys the requested value of their services because, under such arrangements, the attorney accepts the case with the possibility that they would not receive compensation. Nigh contends that cases like this have been and remain very undesirable in the legal community because most lawyers cannot find a way to make money and keep from going bankrupt while practicing this kind of law. Further, Nigh argues that most clients who need legal help with problems with car dealers often have poor credit, little money, and are unable to afford to pay a lawyer's hourly rate. Yet, in this case, Nigh's counsel did not proceed on a contingency basis. Nigh argues that the legislative intent of the fee-shifting provisions in the TILA and the VCPA are to make these cases more desirable for attorneys to bring, thereby, helping the government enforce the statutes. Koons

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[2] Johnson Factor 6 considers whether the fee is fixed or contingent.

[3] Johnson Factor 10 considers the overall "undesirability" of the case.

does not contest the undesirability of these types of cases. Therefore, the Court holds that these types of cases are indeed undesirable. Thus, the Court holds that this factor is favorable to awarding Nigh some amount for attorneys' fees.

11. The nature and length of the professional relationship between attorney and client.

The Court holds that no special relationship existed between Nigh and his attorneys. In *Superior Form Builders*, the court considered whether the plaintiff received a special rate from any of the attorneys involved in the case. *See* 881 F. Supp. at 1028. In this case, Nigh never describes in detail the relationship between him and his attorneys. However, Nigh does state that this sort of case rarely involves repeat clients; thus, the relationship with the client is short-lived. Koons does not offer any counter arguments in regards to this element. Therefore, the Court holds that no special relationship existed between Nigh and his attorneys. Thus this factor neither favors nor disfavors the award of the requested amount for attorneys' fees because the fees charged were neither increased nor decreased because of any special relationship between Nigh and his attorneys.

12. Awards in similar cases.

The Court holds that to award Nigh the entire amount request for attorneys' fees would be unfair. In *Superior Form Builders*, the court rendered a fair and just award of attorneys' fees. *See* 881 F. Supp. at 1028. Nigh argues that attorneys' fees awarded for similar cases are not well established in this courthouse. However, Nigh did note that this Court recently awarded counsel all of his legal fees at the requested hourly rate in *Harless v. EEE Auto Sales*. *See* Order Granting Pl.'s Mot. Att'ys' Fees ¶¶ 2-3 (Apr. 24, 2001). Although the Court in *Harless* awarded counsel the entire amount of attorneys' fees requested, for reasons previously stated, the Court will not award Nigh the entire amount of attorneys' fees requested because Nigh's success on the merits was marginal. The

Court will make a limited attorneys fee award. As stated by the United States Supreme Court in *Hensley*, the most important factor in determining attorney's fees is the degree of success. *See* 461 U.S. at 436. Here, Nigh asserted over forty claims, some of which the record reflects were boilerplate and without factual basis; The Court dismissed more than thirty claims. In short, the case was over litigated by Nigh's counsel and several claims were without merit. Therefore, only a limited award of attorneys' fees is warranted.

IV. CONCLUSION

In conclusion, the Court awards Nigh attorneys' fees and costs. However, the Court does not award Nigh the entire requested sum of $43,548.50 in attorney's fees and costs. The Virginia Consumer Protection Act and the Truth in Lending Act both give the Court the statutory authority to award attorneys' fees. Nigh was won claims under both acts. However, after applying the *Johnson* factors found in *Superior Form Builders*, the Court holds that the requested amount for attorneys fees is not reasonable because of Nigh's limited success in the lawsuit. Although Factors 7 and 10 neither favor nor disfavor the award of attorneys' fees, and most of the other factors weigh in favor of awarding Nigh the requested attorneys' fees, Factor 8 does not. Although the facts and the law are too related to reduce the amount of the attorneys' fees award on a claim by claim basis, it is necessary to reduce the amount of the reward to reflect Nigh's limited success in this lawsuit. Therefore, the Court reduces Nigh's requested amount of $43,548.50 by forty percent, and thus awards him $29,129.10 in attorneys' fees and costs. Accordingly it is hereby

ORDERED that Plaintiff's Motion for Attorneys' Fee is GRANTED; and

ORDERED that Defendant Koons is ordered to pay Plaintiff Nigh $26,129.10 for attorneys' fees and court costs.

The clerk is directed to forward a copy of this Order to counsel of record.

Entered this 10th day of August, 2001.

/s/
Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
08/10/01

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
July 9, 2003

No. 01-2201
CA-00-1634-A

BRADLEY NIGH

Plaintiff - Appellee

v.

KOONS BUICK PONTIAC GMC, INCORPORATED

Defendant - Appellant

and

HOUSEHOLD AUTOMOTIVE FINANCE CORPORATION

Defendant

No. 01-2224
CA-00-1634-A
CA-00-1634-A

BRADLEY NIGH

Plaintiff - Appellant

v.

KOONS BUICK PONTIAC GMC, INCORPORATED; HOUSEHOLD AUTOMOTIVE FINANCE CORPORATION

Defendants - Appellees

On Petition for Rehearing and Rehearing In Banc

Appellant/cross-appellee Koons Buick Pontiac GMC, Inc. filed a petition for rehearing and rehearing en banc. Appellee/cross-appellant Bradley Nigh filed a response in opposition to the petition for rehearing and rehearing en banc. Defendant/cross-appellee Household Automotive Finance Corporation also filed an answer to the petition for rehearing en banc.

No member of the Court requested a poll on the petition for rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Luttig for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK